


This Book
Does Not
CIRCULATE

Copy 1

BOUND.....APR 18 1974.....



Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois



11 I.A.³ 81

ABST

72-124

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable MEL ABRAHAMSON, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

May 2, 1973

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

Abstract 2 1973

HOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

IN THE

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit
vs.	)	Court for the 15th Judi-
	)	cial Circuit, Stephenson
	)	County, Illinois.
WAYNE E. MARTIN,)	
)	
Defendant-Appellant)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the court.

On April 1, 1968, the defendant, Wayne E. Martin, was indicted by a grand jury of Stephenson County and charged in a three-count indictment with the offenses of rape, indecent liberties with a child (being an act of intercourse) and indecent liberties (lewd fondling). At the time of the incident Martin was 24 years old and the girl was 13. On May 3, 1968, Martin pled guilty to the offense of indecent liberties (intercourse) and was sentenced, after a hearing in aggravation and mitigation, to 4 years probation with the first year to be served at the penal farm at Vandalia. The other charges were dismissed. At the time of his plea,

Martin was represented by a public defender and was advised of his rights and the consequence of his plea.

On October 22, 1969, the state filed a petition to revoke probation for violation of the terms thereof in that Martin had moved to Iowa without the permission of his probation officer. On February 17, 1970, a supplemental petition was filed alleging an additional violation being his failure to support his 4 minor children. A hearing was held on both petitions on March 3, 1970 at which time Martin was represented by private counsel. Martin pled guilty to the allegations of the amended petition and was sentenced to an additional 4 months at Vandalia but probation was not revoked. The trial court failed to admonish Martin as to the possible sentence that could be imposed upon the acceptance of his plea to the amended petition. He was, however, advised of his right to appeal and to have counsel appointed and a transcript provided without cost if he were indigent.

On November 17, 1970, the state again filed a petition to revoke Martin's probation for his failure to report to his probation officer or pay court costs. An amended petition was subsequently filed alleging that the defendant also violated his probation in that he committed the offense of theft of property of value less than \$150. A hearing on the amended petition was held on November 24. Martin appeared in court, without counsel, and admitted that he had pled guilty to a

charge of theft in another county. The trial court admonished him as to the possible maximum penalty for the charge of theft but did not repeat the maximum sentence for indecent liberties in the event probation was revoked. At the conclusion of the hearing, probation was continued with 30 days to be spent in the county jail.

On August 4, 1971, yet another petition to revoke probation was filed. A trial was held on December 20, 1971, at which time Martin was represented by private counsel. The court took the matter under advisement and on February 25, 1972 found that Martin had driven while intoxicated, left the scene of an accident and failed to report to his probation officer. Probation was revoked and, after a hearing in aggravation and mitigation, the defendant was sentenced to serve a term of 4 to 8 years in the penitentiary for the offense of indecent liberties with credit for time already served.

On March 10, 1972, the defendant filed a notice of appeal and the Illinois Defender's Project was appointed to represent him. On October 24, the Project filed a motion to withdraw on the grounds that the appeal was without merit. A copy of that motion was forwarded to the defendant together with our order continuing the matter to November 23 to allow him to file any additional matters meritorious on his behalf. Nothing further has been filed.

We agree that the appeal in this case is without merit. The original plea of guilty was accepted only after the defendant was fully advised as to his rights and admonished as to the maximum sentence that could be imposed. It is true that the court did not repeat the admonition as to the possible penalty that could be imposed if probation was revoked at the hearings held on March 3 and November 24, 1970. However, the time to appeal from those orders has long since expired. Ill. Rev. Stat. 1971, ch. 110A, sec. 606 (b) (c); People v. Nordstrom, 73 Ill. App. 2d 168, 176, 219 N.E. 2d 151.^{177,}

Probation was not revoked on the earlier petitions although the defendant was sentenced to additional time in confinement. Probation was only revoked after a full trial on the matters contained in the last revocation petition. We have carefully reviewed the record in regard to that hearing and find no evidence of reversible error.

We, therefore, allow the motion of the Defender's Project to withdraw as counsel and affirm the judgment of the trial court.

MOTION TO WITHDRAW ALLOWED AND JUDGMENT AFFIRMED.

GUILD, P. J., and THOMAS J. MORAN, J., Concur.

11 I.A.³ 73

72-144

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

April 24, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

BRUNO KOZIOL,

Defendant-Appellant.

FILED
110
Appellate Court, 2nd District
Appeal from the
19th Judicial Circuit,
Lake County, Illinois.

Hon. Lloyd A. Van Deusen,
Judge presiding

MR. PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of
the court.

The defendant herein, Bruno Koziol, was jointly indicted
with Donald Fields in a two count indictment for robbery and
armed robbery. The co-defendant, Donald Fields, received the
same sentence as the defendant herein, to-wit: 3-10 years in
the penitentiary. He appealed separately and we affirmed.
(People v. Fields (1972), 8 Ill. App. 3d 1045 , 291 N.E.2d
258.) Attention is directed to the facts set forth in the
appeal of Fields.

The sole contention of the defendant in the instant case
is that the sentence of 3-10 years is excessive. In support
of this contention he states that only \$134 was taken from the
victim; that he had never been convicted of a felony; that he
was only 22 years of age; that if acts of physical violence
were committed on the victim they were done so by the co-defendant;
that the robbery was not planned; that he had been drinking at
the time of the robbery; that he cooperated with the authorities;
and that he is a good father and husband.

However, it is to be specifically noted that the defendant
as a juvenile was placed on probation and served nine months
in the St. Charles school for boys as a probation violator. It

further appears in the probation report that he had used marijuana and barbituates while in the army, was incarcerated for disciplinary infractions while in the army, and was given an undesirable discharge. His concern for his wife is perhaps misplaced as the defendant testified that after the robbery he and the co-defendant bought a case of beer and a bottle of rum and went to a motel room where they spent the night with a girl they had picked up.

The defendants took \$130 in American Express traveler's checks from the victim and \$4 in cash. Koziol testified that he cashed \$100 of the American Express traveler's checks which were obviously not endorsed by the victim. Of the money received he only gave about \$20 to his wife.

The defendant Koziol and the co-defendant Fields both contended that a broken bottle was not used in robbing the victim. In this regard, the defendant contends in any event he was not the one who committed the assault and all that he did was take the wallet from the victim. However, the victim testified that he was hit over the head with a bottle and that his neck and hand were cut with the edge of a broken bottle. This evidence was considered by the trial court in the application for probation and in the hearing in aggravation and mitigation. We will not substitute our opinion for that of the trial court who had the opportunity to observe the victim and the defendant.

The record of this defendant is not so unlike that of his co-defendant as to warrant any differentiation from the sentence imposed upon the co-defendant, Fields. We therefore adopt that portion of the Fields case, People v. Fields, supra, pertaining to the excessiveness of the sentence and affirm the sentence imposed by the trial court herein.

AFFIRMED.

SEIDENFELD, J., and THOMAS J. MORAN, J., concur.

March 7/13

55397

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
RUDOLPH GAINES,	)	HONORABLE
	)	JAMES D. CROSSON,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE HAYES delivered the opinion of the court:

On 23 September 1969, Rudolph Gaines (hereinafter called defendant) was indicted in Indictment No. 69-2992 on two counts. Count 1 charged defendant with attempt burglary, and Count 2 charged him with possession of burglary tools. On 8 December 1969, in a bench trial on a plea of not guilty to each count, defendant was found guilty of each count. On 11 December 1969, defendant was sentenced to the Illinois State Penitentiary on Count 1 to a term of years not less than seven years nor more than fourteen years, and on Count 2 to a term of years not less than one year nor more than two years, the sentences to run concurrently.

This appeal presents one issue only, namely, defendant's contention that the two crimes of which he was convicted and on which he was sentenced arose out of the same occurrence at the same time and place, so that, under Ill. Rev. Stat. 1969, Chapter 38, Section 1-7(m), there can be but one finding of guilty and one sentence thereon, which finding and sentence are to be for the legally greater of the two offenses as discerned by comparing the maximum statutorily authorized punishment for each of the two crimes. Accordingly, we are asked to reverse the conviction and sentence on the lesser offense of possession of burglary tools.

For the purpose of considering this sole issue, a brief summary of the evidence at the trial will suffice. The complaining witness owned and operated a restaurant, which was always closed on Mondays. On 28 July 1969 (a Monday), the restaurant was

closed as usual. At the rear of the restaurant was a wooden door with a facing of sheet metal on the outside. The door was closed and held in place by a wooden 2 x 4 horizontal crossbar passing through brackets bolted to the rear wall on each side of the inside door frame. An outside screen door was closed and padlocked. On that Monday night and through the early hours of Tuesday, 29 July 1969, the complaining witness was working as a bartender in a tavern across the street from his restaurant.

A Chicago police officer testified that he was on patrol in a police car during the early hours of Tuesday, 29 July 1969. At about 3:00 A.M., he received a message from the Police Communications Center directing him to go to the restaurant address. He parked his car in the mouth of an alley abutting the restaurant, and proceeded on foot down the alley toward the rear of the restaurant. He was joined by another officer responding to the same call. As he walked, he heard noises coming from the rear of the restaurant. When he approached within ten feet of the restaurant's rear door, he used his flashlight together with the flashlight of the accompanying officer to observe a male negro (later identified as defendant) with a screwdriver in each hand prying open the rear door of the restaurant. He told the man to "freeze" and to drop whatever he had in each hand. The man did so. The officer picked up each screwdriver; each was a heavy-duty type with a blade about 20 inches long and a plastic handle. The officer observed that a padlock had been ripped or torn from the inside of the screen door; that the wooden door bore pry marks; that its frame was scratched and chipped; and that the door was partly open.

The complaining witness also testified that when, at about 3:00 A.M. on Tuesday, 29 July 1969, he saw from his position as bartender in the tavern across the street two police cars pull into the mouth of the alley abutting his restaurant, he went across

the street to investigate and met one or two police officers bringing a person whom he identified as the defendant out of the alley. He then went to the rear of his restaurant and observed that the screen on the screen door was torn and that a padlock on the screen door had been broken; that the frame of the wooden door had been pried loose; that the wooden door was partly open; and that the bolts affixing the crossbar brackets to the inside wall were partly out of the wall and that none of these conditions had existed when he had last closed and locked the restaurant and left the premises. The rear door does not face the alley itself but is off the alley.

The defendant testified in his own defense that he had been on his way home through the alley from his job at the Republic Steel Mill when he stopped by the door to urinate; that he had been arrested standing by the door as he had finished urinating at about 4:00 A.M. on the morning in question. Both the complaining witness and the arresting officer testified in rebuttal that neither had noticed any indication of wetness or of urination on or near the rear door.

Turning to the sole issue presented on this appeal, it is clear that whether or not two offenses have resulted from the same conduct as "conduct" is defined in Chapter 38, Section 2-4, must depend upon the circumstances in any given case, unless one of the two offenses is necessarily involved in the other (as for example, the offense of manslaughter is necessarily involved in the offense of murder). The offense of possession of burglary tools is not necessarily involved in the offense of attempt burglary, nor is the offense of attempt burglary necessarily involved in the offense of possession of burglary tools.

We note that Section 1-7(m), literally read, merely provides that consecutive sentences may be imposed when a person has been convicted of two or more offenses which did not result from the same conduct, as "conduct" is defined in Section 2-4. That

definition of "conduct" equates to the phrase "same transaction" as that phrase was used in cases decided prior to the adoption of the two sections in question. The literal converse of Section 1-7(m) would be merely that, when a person has been convicted of two or more offenses which did result from the same conduct, consecutive sentences may not be imposed. The fact is, however, that the prior leading precedent case (People v. Schlenger (1958), 13 Ill.2d 63, 147 N.E.2d 316) had held that, in such a situation, even concurrent sentences may not be imposed; and the comment of the Committee which drafted Section 1-7(m) indicates plainly that that section was intended to codify the holding as to the impropriety of concurrent sentences as well as the holding as to the impropriety of consecutive sentences. That it did so was decided in People v. Stewart (1970), 45 Ill.2d 310, 259 N.E.2d 24.

It is obvious that under the circumstances of the instant case the two offenses of attempt burglary and possession of burglary tools resulted from the same "conduct" or "same transaction". People v. Blahuta (1970), 131 Ill.App.2d 200, 264 N.E.2d 819; People v. Harms, ___ Ill.App.3d ___ (Fourth District, No. 11667, 13 December 1972); People v. Cox (1972), 53 Ill.2d 101, 291 N.E.2d 1; People v. Myles (1971), ___ Ill.App.2d ___, 271 N.E.2d 62.

On oral argument before us, the State was unable to distinguish the instant case from any of the cited cases. Neither can we. Accordingly, we reverse the conviction and the concurrent sentence for the offense of possession of burglary tools.

CONVICTION AND SENTENCE FOR POSSESSION
OF BURGLARY TOOLS REVERSED.

STAMOS, P.J. and LEIGHTON, J., concur.

Abstract only.

The first part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of the history of the United States is not only a study of the past, but also a study of the present. The history of the United States is a history of the struggle for freedom and democracy, and it is a history that has shaped the character of the American people. The study of the history of the United States is therefore a study of the values and ideals that have made the United States a great nation.

The second part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of the history of the United States is not only a study of the past, but also a study of the present. The history of the United States is a history of the struggle for freedom and democracy, and it is a history that has shaped the character of the American people. The study of the history of the United States is therefore a study of the values and ideals that have made the United States a great nation.

The third part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of the history of the United States is not only a study of the past, but also a study of the present. The history of the United States is a history of the struggle for freedom and democracy, and it is a history that has shaped the character of the American people. The study of the history of the United States is therefore a study of the values and ideals that have made the United States a great nation.

The fourth part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of the history of the United States is not only a study of the past, but also a study of the present. The history of the United States is a history of the struggle for freedom and democracy, and it is a history that has shaped the character of the American people. The study of the history of the United States is therefore a study of the values and ideals that have made the United States a great nation.

The fifth part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of the history of the United States is not only a study of the past, but also a study of the present. The history of the United States is a history of the struggle for freedom and democracy, and it is a history that has shaped the character of the American people. The study of the history of the United States is therefore a study of the values and ideals that have made the United States a great nation.

NO. 57137

ABST

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
THOMAS CLIFTON CARL,	)	HONORABLE
	)	GEORGE FIEDLER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Petitioner, Thomas Clifton Carl, was indicted with Gerald Leinen in 1963 for the crimes of murder and robbery, to which petitioner, after having initially entered pleas of not guilty, then entered pleas of guilty and for which he was sentenced to twenty years to ninety-nine years on the murder conviction and to two years to ten years on the robbery conviction, the terms to run concurrently. (The record does not indicate whether an appeal was taken therefrom.) In April 1971 petitioner filed a petition pursuant to the provisions of the Illinois Post-Conviction Hearing Act, alleging the violation of his constitutional rights at the trial stage of the proceeding. (Ill. Rev. Stat. 1969, ch. 38, par. 122-1, et. seq.) The State filed a motion to dismiss the petition and after a hearing on the motion the petition was dismissed. Petitioner appealed.

The Public Defender of Cook County was appointed counsel for petitioner on this appeal and has filed in this court a motion for leave to withdraw as appellate counsel on the grounds that the appeal is frivolous and wholly without merit. He has also filed a brief in support of his motion, pursuant to the dictates of Anders v. California, 386 U.S. 738, referring to matters which might possibly be raised on appeal but which he states are without merit. Copies of the motion and brief were forwarded to petitioner and this court allowed him time to file any additional points he wished on this appeal. Petitioner has not responded.

1851

1851

1851

1851

1851

1851

1851

1851

1851

1851

1851

Petitioner has raised several matters in his post-conviction petition; namely, that his trial counsel were incompetent because they failed to move to suppress a statement given by petitioner to police and because they failed to move for a hearing to determine his competency to stand trial; that he should have been allowed a competency hearing because his incompetency was evidenced by the fact that "there was no logical reason for the commission of the crime" and he should have been appointed a "bar association" lawyer for the hearing; and that he was not admonished that he had a right to appeal from his conviction upon his pleas of guilty. He also alleged that the statement given to the police was given without admonishments as to his constitutional rights, and that he was not advised that he had a right to a jury trial on the question of his competency.

Counsel for petitioner represented to the trial court at the time the case was called for trial that petitioner wished to enter pleas of guilty to the indictments, at which time the following colloquy occurred:

THE CLERK: Thomas Clifton Carl, Gerald C. Leinen.

MR. NELSON (petitioner's counsel): Your Honor, on behalf of Thomas Clifton Carl, after consultation with him, with his attorneys and his mother present, we would like to withdraw the plea of not guilty entered in both indictments and enter a plea of guilty--pleas of guilty.

THE COURT: Let me see both files. Very well, then, Thomas Clifton Carl and Gerald C. Leinen, your respective attorneys have stated in open court that in each of these two cases you wish to withdraw your pleas of not guilty and enter pleas of guilty in each case. Mr. Carl, is that correct?

DEFENDANT CARL: Yes.

THE COURT: To both cases?

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: Now, then, when you plead guilty in both cases you will thereby be waiving a jury trial in both cases. Do you understand that, Mr. Carl?

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: Now, then, Thomas Clifton Carl, are you pleading guilty--

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: And in the other Indictment, 63-2112, Thomas Clifton Carl, are you pleading guilty to robbery because you are guilty?

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: Now, then, I must tell both of you clearly that before this Court can accept your two pleas of guilty to the two indictments, it is my duty to advise you that in the indictment which charges you with murder the court has the power to sentence and punish by a sentence of death in the electric chair or by imprisonment in the Illinois State Penitentiary for any indeterminate term with a minimum of not less than fourteen years.

Have had (sic) that explained to you, Thomas Clifton Carl, do you persisting in your plea of guilty to the indictment for murder?

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: In the indictment for robbery, Mr. State's Attorney, this is not armed robbery?

MR. NELSON: No, it's not.

THE COURT: Plain robbery?

MR. NELSON: Plain robbery.

MR. GILL: It is plain robbery, your Honor.

THE COURT: Under the Illinois statute of the new criminal code it states, a person convicted for robbery shall be sentenced to the penitentiary from one to twenty years. Knowing that, Mr. Carl, do you persist in your plea of guilty to robbery?

DEFENDANT CARL: Yes, sir.

* * *

THE COURT: Very well. Mr. Clerk, let the record show that the two defendants, Thomas Clifton Carl and Gerald C. Leinen, have been carefully advised in open court of the consequences of their pleas of guilty to the indictment of murder and to the other indictment for robbery, after being so advised each one persists in his two pleas of guilty. The two pleas of guilty will now be accepted.

THE [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

In Indictment No. 63-2111 there will be a finding by the court against both of the defendants, Thomas Clifton Carl and Gerald C. Leinen, of murder in manner and form as charged in that indictment. And in the other indictment there will be a finding against Thomas Clifton Carl and Gerald C. Leinen that they are guilty of robbery in both cases in manner and form as charged in the respective indictment. There will be separate judgments in the separate cases.

Mr. State's Attorney, what are the facts?

Petitioner and Leinen (aged 19 and 20, respectively) gave a joint statement to the police on June 24, 1963 that in the early morning hours on or about May 4, 1963 they were drinking beer in a cemetery while seated on Leinen's father's grave and became noisy; that the victim shouted at them; that petitioner struck the victim, acquired a knife, and demanded money from the victim; that, at knifepoint, the victim was driven in an automobile to a drainage ditch area where the boys attempted to stab the victim, resulting in the breaking of the knife; that automobile lug wrenches were produced from the automobile and the boys beat the victim about the head until he was dead; and that money was taken from the victim and the boys departed the scene. The victim's body was found on May 14, 1963, and petitioner was arrested on June 24, 1963 in connection with the commission of another crime, after which he confessed to the instant crimes and implicated Leinen. The boys re-enacted the crimes for the police, and a pair of sunglasses which petitioner had lost during the commission of the crimes was found at the scene.

At the hearing on the State's motion to dismiss the petition, the assistant public defender appointed to represent petitioner advised the court that after interviewing the petitioner and reading all the documents filed in the case, as well as the transcript of the proceedings taken at the change of plea, he was unable to find any matter upon which to predicate a violation of petitioner's constitutional rights. He related that the court at the change of plea proceeding had before it

The first of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due
to the fact that the government
has been unable to raise the
necessary funds to carry out its
policy. This is due to the fact
that the government has been
unable to raise the necessary funds
to carry out its policy.

The second of these is the fact that
the government has been unable to
obtain the necessary funds to
carry out its policy. This is due
to the fact that the government
has been unable to raise the
necessary funds to carry out its
policy. This is due to the fact
that the government has been
unable to raise the necessary funds
to carry out its policy.

The third of these is the fact that
the government has been unable to
obtain the necessary funds to
carry out its policy. This is due
to the fact that the government
has been unable to raise the
necessary funds to carry out its
policy. This is due to the fact
that the government has been
unable to raise the necessary funds
to carry out its policy.

The fourth of these is the fact that
the government has been unable to
obtain the necessary funds to
carry out its policy. This is due
to the fact that the government
has been unable to raise the
necessary funds to carry out its
policy. This is due to the fact
that the government has been
unable to raise the necessary funds
to carry out its policy.

The fifth of these is the fact that
the government has been unable to
obtain the necessary funds to
carry out its policy. This is due
to the fact that the government
has been unable to raise the
necessary funds to carry out its
policy. This is due to the fact
that the government has been
unable to raise the necessary funds
to carry out its policy.

behavior clinic reports showing that petitioner was competent to stand trial and able to cooperate with his counsel; that petitioner's claim of not having received warnings prior to making the statement to police was obviated by the fact that the statement not only pre-dated the requirements mandated by the case of Miranda v. Arizona, 384 U.S. 436, but the assistant state's attorney who took the statement advised the petitioner that he had a right to remain silent; and that petitioner was represented by two privately retained counsel at the change of plea proceeding. After taking the matter under advisement for a month, the court dismissed the petition.

A review of the record by this court, as required by the Anders decision has revealed no grounds upon which relief can be granted pursuant to the post-conviction petition, nor grounds which would support an appeal from the dismissal thereof. The colloquy and the admonishments which occurred at the change of plea proceeding, and the other circumstances of the case, reveal that petitioner was represented by competent counsel. Their failure to move for a competency hearing or to move for the suppression of the statement was clearly a matter of trial strategy, especially in light of the fact that petitioner knowingly, understandingly and voluntarily entered his pleas of guilty. (Ill. Rev. Stat. 1963, ch. 38, par. 732; ch. 110, par. 101-26.) See also People v. Dean, 31 Ill. 2d 214, 201 N.E. 2d 405.

There is nothing in the record which would have raised a question as to petitioner's competency to stand trial, and in fact the trial court had before it the petitioner's behavior clinic report ordered made by the court on motion of petitioner's counsel. (See e.g., People v. Burson, 11 Ill. 2d 360, 143 N.E. 2d 239.) The fact that petitioner committed a senseless crime does not raise a question as to his competency to stand trial or to enter a guilty plea.

Petitioner's contention that the court erred in failing to

advise him of the right to appeal the judgment entered upon his pleas of guilty is also meritless. At the time he pleaded guilty, there was no provision that he be advised of his right to appeal. Further, Supreme Court Rule 27(6) later provided that a defendant who pleads guilty to an offense was not entitled to such an admonishment (Ill. Rev. Stat. 1965, ch. 110, par. 101-27(6)).

Our review of the transcript taken at the post-conviction hearing reveals that the petitioner's appointed counsel fulfilled all requirements of the case of People v. Slaughter, 39 Ill. 2d 278, 235 N.E. 2d 566, and was unable to find a violation of petitioner's constitutional rights.

In view of the foregoing, we conclude that an appeal in this case would be without merit and could not be successful. The motion of the public defender of Cook County is accordingly allowed and the judgment is affirmed.

Motion allowed; affirmed.

Publish abstract only.



11 I.A.³ 38
ABST. ABST

55994

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
RONALD FAGIN,)	
Defendant-Appellant.	)	HON. ROBERT J. COLLINS,
		Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

The defendant was found guilty in a bench trial of the crime of burglary. He was sentenced to not less than one nor more than three years in the state penitentiary. He appeals from that decision on the grounds that he was not proved guilty beyond a reasonable doubt and that the sentence imposed was excessive.

At about four o'clock in the morning on June 15, 1970, Sergeant Ronald Ryan of the Chicago Police Department was patrolling the area of 6600 South Kedzie Avenue in Chicago, when he saw a person inside the building which housed Kay-Zee Liquors, Inc. He got out of his car and approached the building for a closer look. From outside the front door he observed the defendant and another man inside the building, near the rear bar portion of the establishment. The front portion of the building contained a package liquor store. Sergeant Ryan returned to his car, radioed for help and then drove to the rear of the building. Leaving his car he approached the building on foot. He heard a noise and observed a man running away from the premises. He gave chase but was unable to apprehend the man. He returned to the area of the liquor store and examined the point where the fleeing man had dropped a bag of coins. As Sergeant Ryan was doing so, Sergeant Patrick Judge arrived. The sergeants exchanged a few words and then spotted the defendant running eastbound on 66th Street.

Sergeant Judge gave chase in his car, and Sergeant Ryan followed on foot. Sergeant Judge overtook the defendant and had him in custody when Sergeant Ryan arrived and identified the defendant as one of the men he saw inside the liquor store.

After the defendant was apprehended, the police notified the bartender who managed the store in the absence of the owner, who was on vacation at the time of the incident. He arrived and entered the store, where it was discovered that a hole had been cut in the roof. An examination of the roof disclosed a number of tools near the hole. The hole was large enough for a man to go through.

The jukebox inside the building had been moved and damaged, and some cash, in the form of coins, had been taken. Inside the building was found a black hat and one grey glove. Sergeant Ryan testified that the defendant's accomplice had a black hat on when seen from the front window.

The defendant contended that he had been visiting a friend until past three in the morning of the date in question, that he hitch-hiked part way home and that he was walking the rest of the way home when he was seen by the police. Thinking that he might be recognized because he was absent without leave from the army, he began to run when he saw the police. He denied having anything to do with the burglary.

The defendant's first contention on this appeal, that he was not proved guilty beyond a reasonable doubt, is based on two arguments. The first concerns the trial judge's statements. The defendant asserts that the trial judge's comments indicate that he based his findings on the weakness of the defense, rather than on the strength of the state's case.



It is apparent that the judge felt the state had satisfied its burden of proving the defendant guilty beyond a reasonable doubt.

The defendant also cites two instances where the trial judge refused to revoke the defendant's bond. The judge in each instance indicated that there may have been error committed at trial and that he would not revoke bond until a determination of error or lack of it were made. This procedure simply recognized the fact that a higher court could review the trial judge's decision, possibly finding error. Rather than indicating doubt on his part, the judge's statements simply granted the defendant his freedom while the post-conviction review proceeded. The decision not to revoke the defendant's bond was well within the trial judge's discretion. (Ill.Rev.Stat., 1969, ch. 38, par. 110-7(d)).

In summation, the trial judge's comments in no instance exhibited a legal uncertainty as to whether the defendant was guilty beyond a reasonable doubt. Hence, the comments do not require reversal. People v. Olson, 3 Ill.App.3d 240, 278 N.E.2d 861.

The defendant's second argument in support of his first contention is that the evidence taken as a whole raises a reasonable doubt of his guilt. We find no merit in this contention. The defendant was seen by a police officer inside the burglarized building, which was illuminated by the lights the manager had left on. He was apprehended a short time later in the vicinity, running from the scene of the crime. The defendant, in taking the stand, assumed the risk of being disbelieved. People v. Davis, 71 Ill. App.2d 300, 218 N.E.2d 850.

The defendant challenges the accuracy of Sergeant Ryan's identification of him as the man inside the store and cites discrepancies in the officer's testimony (not with respect to the

identification) as justification for a reasonable doubt of the defendant's guilt. But the rule is:

"Ordinarily contradictions and discrepancies in testimony are to be resolved by the trier of fact. And it is so axiomatic as not to require citation of authority that the testimony of one credible witness alone, if positive, is sufficient to convict even where the testimony is contradicted by the accused." People v. Olson, 3 Ill.App.3d at 244-45, 278 N.E.2d at 864.

The discrepancies in the officer's testimony were not sufficiently material to require reversal, and there is no reason in the record to doubt the accuracy of the officer's identification of the defendant.

The defendant's second contention is that the sentence he received is excessive, and that it should be reduced to probation. This court will not disturb a sentence unless it represents a clear departure from fundamental law or is not proper to the nature of the offense. (People v. Adams, 113 Ill.App.2d 205, 252 N.E.2d 35). The sentence for the crime of burglary is one to an indeterminate number of years. (Ill.Rev.Stat., 1969, ch. 38, par. 19-1). The sentence in this case was within the statutory limits and we find no reason in the record to alter it.

The trial judge, who was in a better position than this court to conduct a pre-sentence investigation, held a hearing on mitigation and aggravation at which it was educed that the defendant had in 1970 been found guilty of resisting arrest and was fined. At the same time he was placed on probation for one year for criminal damage to city property. These facts reinforce the efficacy of the trial judge's refusal to allow the defendant probation for burglary.

For the foregoing reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.



11 I.A. 39

ABST

No. 57272

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
vs.)
JAMES D. CASTRO,)
Petitioner-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

PER CURIAM (Fifth Division, First District):

Petitioner appeals from an order dismissing his post conviction petition filed pursuant to the Post Conviction Hearing Act. (Ill. Rev. Stat. 1969, ch. 38, sec. 122-1, et seq.) He argues that he was denied effective assistance of counsel during the post conviction proceedings. Petitioner's allegation in his post conviction petition was that perjury was committed at his trial in that the police officer testifying in petitioner's two different trials had given contradictory versions of the same transaction.

Petitioner was charged with the sale of heroin occurring on April 4, 1968, in indictment 68-2087. He was convicted and filed an appeal in case No. 54915. The conviction was reversed and remanded for a new trial.

Petitioner was also charged with the sale of heroin occurring on April 1, 1968, in indictment 68-1305. He was convicted and appealed case No. 56524. While this appeal was pending, petitioner filed a pro se conviction petition on May 5, 1970, regarding his conviction under indictment 68-1305. On October 22, 1970, the petitioner's post conviction petition was dismissed upon motion of the State and it is that order of dismissal that petitioner now appeals from. Petitioner argues that he was denied effective representation of counsel at the post conviction proceedings.

On March 20, 1973, this court reversed and remanded for a new trial defendant's direct appeal from his conviction under indictment 68-1305. (People v. Castro, No. 56524 (filed March 20, 1973).) The

57272

issue raised on appeal from the dismissal of his post conviction petition, to-wit, ineffective assistance of counsel at the post conviction proceedings, is rendered moot thereby.

On motion of the court, the appeal from the order dismissing the post conviction petition is dismissed.

Appeal dismissed.

ABSTRACT ONLY



58034

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
v.)	
)	
HERMAN MITCHELL,	)	HONORABLE
	)	JOHN C. FITZGERALD,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Petitioner appeals from an order dismissing his amended post-conviction petition filed pursuant to the Post-Conviction Hearing Act. Ill.Rev.Stat. 1971, ch. 38, par. 122-1, et seq. In his petition and in this court, he argues that his constitutional rights were violated at the trial through admission into evidence of his in-court identification by the complaining witness because that identification was tainted by an unnecessary and highly suggestive identification procedure at the preliminary hearing.

On March 18, 1966, after a jury trial, petitioner was convicted of robbery and aggravated battery and was sentenced to concurrent terms of 10 to 20 years and 5 to 10 years, respectively. Petitioner appealed that conviction to this court and on November 24, 1968, this court affirmed the convictions. People v. Mitchell, 101 Ill.App.2d 380, 243 N.E.2d 358. On September 18, 1969, petitioner filed a pro se post-conviction petition. An attorney was appointed to represent him and on January 14, 1971, an amended post-conviction petition was filed, supported by affidavit and a memorandum of law. On March 26, 1971, upon the state's motion, the amended petition was dismissed without an evidentiary hearing.

A proceeding under the Post-Conviction Hearing Act is for the purpose of inquiring into the constitutional phases of the

The first part of the book is devoted to a general introduction to the subject of the history of the English language. It begins with a discussion of the early history of the English language, from its roots in the Germanic languages to its development as a distinct language. The author then discusses the influence of other languages on English, particularly Latin and French, and the role of the English language in the development of the British Empire.

The second part of the book is devoted to a detailed study of the English language in the Middle Ages. It begins with a discussion of the Old English language, which was spoken from the fifth to the eleventh century. The author then discusses the Middle English language, which was spoken from the eleventh to the fifteenth century. This section includes a detailed study of the works of Chaucer, who is considered one of the greatest writers in the English language.

The third part of the book is devoted to a study of the English language in the modern period. It begins with a discussion of the Early Modern English language, which was spoken from the fifteenth to the seventeenth century. The author then discusses the Late Modern English language, which was spoken from the seventeenth to the nineteenth century. This section includes a detailed study of the works of Shakespeare, who is considered one of the greatest writers in the English language.

The fourth part of the book is devoted to a study of the English language in the twentieth century. It begins with a discussion of the Modern English language, which was spoken from the nineteenth to the twentieth century. The author then discusses the Postmodern English language, which was spoken from the twentieth century to the present. This section includes a detailed study of the works of modern writers, such as T.S. Eliot and W.H. Auden.

The book concludes with a chapter on the future of the English language. The author discusses the challenges facing the English language in the twenty-first century, such as the influence of technology and globalization. He also discusses the role of the English language in the future of the world.

original conviction which have not already been adjudicated. People v. Beckham, 46 Ill.2d 569, 264 N.E.2d 149. Where a point thus made has previously been considered and rejected by this court on direct appeal, any reconsideration of the same proposition in a post-conviction proceeding is barred by the doctrine of res judicata. People v. Walker, 6 Ill.App.3d 909, 286 N.E.2d 812; People v. Westbrook, 5 Ill.App.3d 970, 284 N.E.2d 695. Further, the concept of res judicata includes all claims which could have been raised but were not, those claims being considered waived. People v. Ashley, 34 Ill.2d 402, 216 N.E.2d 126; People v. Jones, 5 Ill.App.3d 951, 284 N.E.2d 418. This rule will be relaxed only where fundamental fairness requires it. People v. Mamolella, 42 Ill.2d 69, 245 N.E.2d 485.

On petitioner's appeal of his convictions to this court, he specifically argued the insufficiency of the identification testimony, and that contention was rejected. The sole point in petitioner's post-conviction argument is therefore barred by the doctrine of res judicata.

Petitioner argues that the doctrine should not be applied here because the evidence of constitutional error complained of was not evident at the time of trial or on appeal. The basis of this argument is that the allegations relative to the manner in which the petitioner was identified are contained only in the preliminary hearing transcript which was not part of the record on appeal. The record in the case demonstrates, however, that the preliminary hearing transcript was available at the time of trial and was used at that time by the defense attorney. The point is thus unsupported by fact and is without merit. See People v. Adams, 52 Ill.2d 224, 287 N.E.2d 695.

Petitioner also argues that the doctrine of res judicata should not be applied in the case at bar since fundamental fairness requires otherwise. A review of the facts as stated in the opinion



handed down by this court in the petitioner's direct appeal demonstrates that he was identified by five eyewitnesses as the perpetrator of the offense. In this circumstance, we fail to see how fundamental fairness would require a relaxation of the doctrine of res judicata.

Petitioner also raises the question that the doctrine of res judicata should not be applied in the case at bar because there has been a change in the law. The basis of this argument is that petitioner's trial was held in 1966 prior to the United States Supreme Court's decision in Stovall v. Denno (1967), 388 U.S. 293, 87 S. Ct. 1967, and since that doctrine is fully retroactive, there has been a change in the law concerning proper identification procedures. The answer is given in People v. Ikerd, 47 Ill.2d 211, 265 N.E.2d 120, where the court considered a similar argument, concluding:

The strict application of res judicata has been relaxed where fundamental fairness dictates otherwise, as here, where the right relied on has been recognized for the first time after the direct appeal.

In the case at bar, Stovall was decided some 17 months prior to the decision in petitioner's direct appeal in 1968 and therefore does not represent new law which would require the relaxation of the res judicata principle.

The judgment of the circuit court is affirmed.

A F F I R M E D.

(Publish abstract only)

55999

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
RONALD HUNTER,	)	HONORABLE FRANK J. WILSON
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The defendant was convicted of burglary after a bench trial and sentenced to a term of two to six years in the penitentiary. He contends that he was not proved guilty beyond a reasonable doubt and that he was denied due process of law when the trial court refused to allow him to introduce evidence of a witness' bias.

Dale Buehler and John Fitzgerald, two Chicago police officers, testified that on August 31, 1970, at approximately 7:00 a.m., they were on duty with Officer Ferguson. After talking to a citizen they proceeded to the Warwick Liquor Store located at 537 East 47th Street. There they each observed the defendant inside a cyclone fence which enclosed the rear of the Warwick Liquor Store. The rear door to the liquor store was open and the glass transom was broken. The defendant was pushing a crate under the cyclone fence which had been pried up. The defendant took the crate and proceeded down the alley with another man. Upon seeing the squad car the two men dropped the crate and ran into an alley with the officers in pursuit. The defendant ran to the rear porch of 4716 Forrestville where he was apprehended; the second man escaped. The crate contained whiskey bottles. At the station, while the police were inventorying the whiskey bottles, the defendant asked if he

117-21

1901

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

117-21

could have one because he went through a lot of trouble to get them. The defendant had a cut on his arm.

There was a stipulation that if Gilbert Harrell were called as a witness he would testify that he is the owner of the Warwick Liquor Store. On August 31, 1970, at 12:30 a.m. he closed the premises, and all doors and windows were closed. At 7:30 a.m. he returned to his store and observed the glass rear transom window broken. He identified the crate and whiskey bottles the defendant had carried as his property. He had given no one permission to enter his store. Over \$1000 worth of whiskey had been taken. Four chains on his rear door were cut from the inside.

Michael McCarthy, a detective, testified that no burglar tools were found at the scene.

Marguerite Louis, the defendant's mother, testified that on August 31, 1970, she saw the defendant as he left home at about 7:00 a.m. with two friends. At approximately 7:25 a.m. she saw her son in police custody. She lives across from the Warwick Liquor Store.

Ruby McNeil, the defendant's sister, testified that on August 31, 1970, at about 7:00 a.m., she observed the defendant leave the house with two friends.

The defendant testified that he was on probation for burglary. On the morning of August 31, 1970, he left his home with two friends. As he was walking through the alley he observed liquor bottles in the yard of the Warwick Liquor Store and the crate of whiskey bottles outside the fence. After he took the crate he saw the police and ran. He denied entering the burglarized premises or the yard of the premises and denied having a cut on his arm.

The defendant first contends that he was not proved guilty beyond a reasonable doubt because entry into the burglarized premises was not established and that his guilt was not established to the exclusion of every reasonable hypothesis of innocence. In a case factually similar the court upheld a conviction of burglary saying: "It is true that the circumstances relied upon to prove guilt ' * * * must be of a conclusive nature and tendency leading, on the whole, to a satisfactory conclusion and producing a reasonable and moral certainty that the accused and no one else committed the crime.' [citation] 'This, however, does not require that guilt be proved beyond any possibility of a doubt.' [citation]" People v. Rosario, 4 Ill.App.3d 642, 644, 645, 281 N.E.2d 714.

The defendant was seen on the inside of the fence surrounding the rear of the premises pushing a large crate of liquor under the fence which had been pried up. When observed the defendant was only a short distance from the rear door of the premises which had been forced open by first breaking a glass transom. When he saw the police the defendant dropped the whiskey and fled. The defendant had a cut on his arm when he was arrested. While at the police station the defendant asked if he could have a bottle of whiskey since he had gone to so much trouble to get it. This evidence was sufficient for the trier of fact to find the defendant guilty beyond a reasonable doubt.

The defendant argues further that his testimony and that of his mother and sister presented a reasonable theory of innocence. His testimony was directly contradicted by the two police officers. The credibility of the witnesses was for the trial judge to determine and his finding will not be disturbed unless the evidence



is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Glover, 49 Ill.2d 78, 273 N.E. 2d 367.

The defendant's last argument is that he was denied due process of law when he was not allowed to introduce evidence of a witness' bias against him. An assistant public defender testified that he heard Officer Ferguson offer the defendant leniency in return for information in an unrelated murder investigation and that the defendant refused the offer. This testimony was stricken. The defense request to call an assistant state's attorney who was allegedly present during the offer was denied. The testimony relating to the alleged offer, even if considered relevant and proper impeachment, would go only to the alleged bias of Officer Ferguson. Since Officer Ferguson did not testify in the defendant's trial, there was no testimony which could be shown to be biased. The trial judge's ruling was correct.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

ABSTRACT ONLY



56092

ABST.

GAMM CONSTRUCTION COMPANY,)	
)	
Plaintiff-Counter-Defendant,	)	APPEAL FROM THE CIRCUIT
Appellant,	)	COURT OF COOK COUNTY.
)	
v.)	
)	
GILBERT R. BERKSON and SONYA BERKSON,	)	HONORABLE ALBERT S. PORTER,
his wife,	)	Presiding.
)	
Defendants-Counter-Plaintiffs,)	
Appellees.)	

MR. JUSTICE EGAN delivered the opinion of the court.

This appeal involves a construction contract wherein the plaintiff, Gamm Construction Company, brought an action to recover an unpaid balance of \$1606 allegedly due it under the contract. Gilbert R. Berkson and Sonya Berkson, his wife, filed an answer and a counterclaim seeking damages for Gamm's failure to perform under the contract in a good and workmanlike manner. The answer and counterclaim were based on an alleged improper pitch in the exterior portion of the entryway which caused the drainage of water into the premises, improper laying and scraping of brick in order to make the surface smooth and improper application of mortar in the walls. The plaintiff filed no response to the counterclaim. The trial judge found for the defendants on the original complaint and for the counter-plaintiffs on the counterclaim in the sum of \$1500. The defendants concede that the judge's finding in their favor was based solely on the allegation that the improper pitch caused drainage into the premises. The other two allegations will be discussed only insofar as they relate to the question of credibility. The sole issue is whether the finding of the circuit court is contrary to the manifest weight of the evidence.

Name	Address
J. H. Smith	123 Main St.
W. B. Jones	456 Elm St.
C. D. Brown	789 Oak St.
A. E. White	101 Pine St.
M. L. Green	234 Cedar St.
R. T. Black	567 Birch St.
S. P. Gray	890 Spruce St.
D. K. Hall	112 Willow St.
L. A. Young	345 Ash St.
H. G. King	678 Hickory St.
J. M. Lee	901 Magnolia St.
K. N. Scott	1234 Poplar St.
P. Q. Adams	4567 Walnut St.
T. U. Baker	7890 Cherry St.
V. W. Carter	1011 Peach St.
X. Y. Evans	2345 Apple St.
Z. A. Fisher	5678 Pear St.
B. C. Hill	8901 Plum St.
D. E. King	12345 Orange St.
F. G. Lee	45678 Lemon St.
H. I. Scott	78901 Grape St.
J. K. Adams	10112 Melon St.
L. M. Baker	23456 Berry St.
N. O. Carter	56789 Citrus St.
P. Q. Evans	89012 Olive St.
R. S. Fisher	123456 Coffee St.
T. U. Hill	456789 Tea St.
V. W. King	789012 Spice St.
X. Y. Lee	101123 Herb St.
Z. A. Scott	234567 Root St.

Gamm Construction Company is engaged in the contracting and engineering business. On April 24, 1969, Stanford Gamm, one of the partners of Gamm Construction Company received a phone call from Robert G. Berlow, an architect hired by the defendants, wherein Berlow requested the plaintiff to bid on the construction of a two-story building. Gamm sent in the bid as requested and was later called by Berlow and informed that the owners, Gilbert and Sonya Berkson, had approved the bid.

During the course of construction Berlow requested, either through letters or verbal orders, additional work to be done by Gamm, which was not specified on the itemized list of work originally bid on. At the completion of the construction, Gamm Construction Company presented an invoice to Berlow, dated December 29, 1969, for work performed. The amount of the invoice was \$3539, which represented the contract amount and the extra costs of additional work unpaid as of the date of the invoice.

About a week later, Berlow called Gamm and asked him to bring the waivers of lien to his office; he said he would give Gamm a check for the amount shown on the invoice. Gamm testified that nothing was mentioned at this time about the material being defective. Gamm's partner, Mr. Romane, brought the waivers to Berlow's office but was not paid the full amount of the invoice. On February 12, 1970, Berkson paid Gamm Construction Company \$1933, leaving an unpaid balance of \$1606, which was not paid despite a demand and request. Gamm testified that, subsequent to the time they turned over the waivers, funds were released from the mortgagee in connection with the payment of sums as stated in the invoice and received by either Berkson or Berlow but were never turned over to him. Gamm Construction Company then sued the owners for the unpaid balance of \$1606.

The building which is the subject matter of this suit was a two-story commercial structure with an antique store on the first floor and offices on the second floor. Special pains were taken to present a face that would "significantly be that of an antique shop." The entrance to the antique shop was to be set back ten feet from the front of the building creating a patio between the street and the display windows approximately ten feet deep by twenty feet wide. The remaining five feet of frontage was taken up by steps leading to the second floor. The patio was entirely overhung by the second floor.

The patio was to be built by the laying of brick and originally was to be the same level as the street. However, as the building was being constructed, it was found that the grade at the front of the lot was almost two feet lower than the grade at the back, and this necessitated the raising of the building with concrete and fill. To correspond to this raising of the building, concrete curb risers were ordered to allow an entrance to the building which was now two feet higher in front. The patio made with brick was to be built between the entrance to the building and the stairs. It was originally intended that the work be done by building the top stair to meet the level of the existing floor inside the building.

According to the original plans, the elevation of the top step was to be established off the finished floor on the inside of the building. Four risers would then be dropped to come as close to the walk as possible, and what was left would be picked up by a walkway. With the top stair being the same elevation as the raised inside of the premises, there was a 2-1/2 inch recess left between the top stair and the raised

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1880. The names are given in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1880 are as follows: [The text continues with a list of names, which are mostly illegible due to the quality of the scan.]

inside. This recess was to be taken up by brick, which is approximately 2 inches thick, set in approximately 1/2 inch of mortar. The end result, under the original plan, would be that the top stair and the level of the patio would be approximately the same or slightly below the inside premises. However, due to a change in the plans the patio sloped toward the entrance way creating a reverse pitch which caused the drainage of water into the premises. This case depends on the determination of who shall bear the blame for the reverse pitch.

Alfred Nielson, the cement mason who was going to pour the steps and an employee of Gamm, testified that on the day the concrete steps were to be poured Berlow approached him and stated there was not enough room between the top of the step and the base of the floor for the brick to be put in and asked that it be raised two inches higher. He told Berlow that it would be too high, but Berlow said they could take care of it with the brick and that he would rather have a thicker bed of mortar. The bed for the bricks in the patio had been laid, as was the floor on the inside premises; the forms were in place, but the concrete had not been poured.

Nichy Ochot, the general superintendent for Gamm Construction Company, testified that he checked the forms for the steps in the morning and returned in the afternoon only to find that the concrete had been poured 2 inches higher than was set up that morning. He was told by Nielson that Berlow had come to the job and informed him to raise the grade approximately 1-3/4 to 2 inches. Ochot supervised the laying of brick, and the morning they started the brickwork he asked Berlow to come to the job because he foresaw the problem brought about by the raising of

the grade and wanted to know what Berlow wanted done with the brick. He testified that Berlow told him not to worry about it since there was an overhang in the building above the patio, and, since there was never an east wind, the water would not be blown onto the patio. Ochot felt that, because the original grade was changed, it was impossible to lay the bricks so that water would not run inside the premises.

Berlow testified that he was on the job practically every day during the construction and that he had a discussion with Nielson at the time the front steps were poured but did not mention anything at all as to what the top level of the top stair should be; he conceded this is the most important factor in determining the grade back to the frost wall. At the time of his conversation with Nielson, there was nothing apparent to him indicating how the porch was going to drain if it was constructed in the way he saw it started. He did not draw up a plan for the grade and never submitted specifications to Gamm Construction other than his notes on the drawings.

Berlow also testified that Ochot started his work with a "roll lock" at the edge of the first step. A "roll lock" consists of turning the bricks on their side, rather than laying them flat, so that their width became their height. This manner was different than he had originally planned. The idea appealed to him and he decided to leave it but told Ochot to make sure they covered the frost wall which was at the line of the front entrance. He came back the next morning when the brick had just been finished being laid and found that it had not been brought up to clear the frost wall as he had instructed. This created the reverse pitch.

Berlow was asked whether by continuously laying the bricks on their side it would have resulted in an improper meeting at the level of the floor of the building. His answer was that, since the door and wall were not yet in place, the original recess could have been filled in and the level of the patio closest to the door could have been raised. At one point in his testimony, he said that he complained to the plaintiff that the porch was improperly pitched almost immediately after it was done. Later, he said that he first noticed the condition after the "spring thaw" and notified Gamm by letter. The letter was not produced at the trial. The "spring thaw" the witness was talking about appears to be of 1970, but the suit was filed in April of 1970.

Gamm testified without contradiction that the paving work was completed in September or October of 1969 and that Berkson complained to him in February, 1970, that the porch drained the wrong way.

The point urged by the defendants that we must first consider concerns the jurisdiction of this court to consider both the judgment against the plaintiff in the original suit and the judgment against the plaintiff on the counterclaim. It is the defendants' contention that the notice of appeal concerns only the judgment against the plaintiff on the counterclaim. The purpose of a notice of appeal is to inform the party in whose favor a judgment has been rendered that the unsuccessful party desires a review of the case by a higher tribunal. (The People v. N.Y.C.R.R. Co., 391 Ill. 377, 380, 63 N.E.2d 405; First Finance Co. v. Ross, 64 Ill.App.2d 474, 478, 211 N.E.2d 588.) In a single order entered on April 21, 1971, the trial judge

entered judgment against the plaintiff on the complaint and against the plaintiff on the counterclaim. The notice of appeal clearly states that the plaintiff is appealing from the judgment entered on April 21, 1971, entered in favor of the defendants and against the plaintiff for the sum of \$1500 and costs of the suit. While the notice of appeal does not recite the entire judgment order, it is sufficient to inform the defendants that the plaintiff was seeking review of the entire judgment order entered on April 21, 1971, which included judgments on both the original claim and the counterclaim. Woods v. Village of LaGrange Park, 298 Ill.App. 595, 610, 19 N.E.2d 396.

Both the plaintiff and defendants agree with the proposition that a reviewing court may not reverse the judgment of the trial court merely because different conclusions could be drawn, other results are more reasonable or if such reversal would entail a mere substitution of judgment for that of the trier of fact. An opposite conclusion must be clearly evident from all the evidence before the judgment can be disturbed. Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 226 N.E.2d 624; Bolander v. Gypsum Engineering, Inc., 87 Ill.App.2d 325, 231 N.E.2d 659.

We are not unmindful of the above rule and its corollary that the determination of fact by the trial judge, who has heard the testimony in open court and has had an opportunity to see the witnesses and listen to their testimony, shall be given due weight and consideration. However, it is also well established that when it appears from a consideration of the entire record that the evidence does not justify the judgment, it is the plain duty of this court to reverse it. Stephenson v. Kulichuk, 410 Ill. 139, 147, 101 N.E.2d 542.

A crucial question is when the defendants or Berlow first became aware of the reverse pitch. Most of Gamm's testimony was un rebutted. He said that the work was completed in September or October, 1969, and Berkson complained to him in February, 1970, of the improper drainage. This, of course, was after Berkson had received the lien waivers and had received all of the mortgage money. Berkson, significantly, was never called as a witness. Berlow, on the other hand, said at one point, when asked when he first complained: "It was first brought out, almost immediately after it was done." Later, he contradicted himself and said it was after the "spring thaw," whenever that was. The suit was filed in April. He testified he complained weeks before the checklist was made out but did not put the item on the checklist. He also testified that he complained about the dripping of the mortar on the walls but did not put that on the checklist. He testified that he complained repeatedly to Gamm and sent him a letter. Again significantly, the letter was never produced. On this state of the record, we must conclude that the only reasonable inference is that Berlow, the supervising architect who was on the job every day, was aware of the reverse pitch before Berkson complained in February, and his attempted explanation that he first observed it after the "spring thaw" was designed to answer the serious question of why it was not mentioned at the time the checklist was made or when he received the lien waivers.

That question, of course, still remains. The only reasonable answer is that Berlow did not put the reverse pitch on the checklist or complain at the time of the lien waiver because he knew that the reverse pitch was the result of his instruction. Berlow

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

1100 S. MICHIGAN AVE.

CHICAGO, ILL. 60607

TEL: 773-936-5000

FAX: 773-936-5001

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

WWW.CHICAGOEDU.EDU

never rebutted Ochot's testimony that Berlow told him not to worry about the reverse pitch because there was an overhang and the wind would not blow the water on the patio.

There were three deviations from the original plans: common brick was used instead of glazed brick; black mortar was used instead of white mortar; and the bricks were placed on their narrower sides instead of their wider ones. Berlow concedes that the first two were made pursuant to his instruction but contends that Ochot, an experienced workman, strangely started that change, which led to all the difficulty, on his own. Berlow, according to his testimony, liked the idea but recognized the potential for complications. Berlow was also contradicted by Nielson, who no longer was employed by Gamm.

When the evidence submitted by the plaintiff is weighed against the testimony of Berlow with its inconsistencies, contradictions and evasions, we must conclude that the finding accepting Berlow's testimony is against the manifest weight of the evidence. See Friedman Elec. v. St. Clair Housing Authority, 23 Ill.App.2d 16, 161 N.E.2d 473.

Finally, defendants urge that there was no defense asserted by the plaintiff in the trial court to defendants' counterclaim for damages. They contend that, if the plaintiff had intended to rely on the defense that it followed Berlow's directions and that his negligence caused the reverse pitch, it had an obligation to assert agency as a defense; by Gamm's failure to answer, they argue, the assertion on appeal that Berlow was the agent of the defendant injects an issue not present. Further, they contend that no evidence was presented on the issue of agency.



In Hamberg v. Mutual Life Ins. Co., 322 Ill.App. 138, 54 N.E.2d 227, the plaintiff filed a reply to a counterclaim alleging that certain alleged misrepresentations in an application for an insurance policy were immaterial. Because there was no further pleading, the plaintiff argued that immateriality of the supposed misrepresentations were admitted. The Appellate Court disagreed and said to hold otherwise would unnecessarily extend the pleadings to be filed in order to arrive at an issue and defeat the purpose of the Practice Act. The defendant could have traversed the reply only by repeating the allegations of its counterclaim.

In this case, the original complaint alleged that Berlow was an agent, and the defendants' counterclaim was merely a repetition of their answer, in which they alleged that the work was not done in a good and workmanlike manner. When the defendants filed their answer and counterclaim, issue was joined. There was no need for the plaintiff to plead further.

Paragraph 2 of the complaint alleges that the plaintiff entered into agreements with the defendants "pursuant to plans submitted by Defendant's architects and agents, Berlow Associates, and agreed to in writing by either Defendant, or by Defendants' agent, Robert Berlow." The defendants in their answer admit they entered into agreements for the work and say nothing about the allegation that Berlow was their agent. This is also true in paragraph 4 of the complaint wherein the plaintiff alleges delivery of waivers to defendants' agent, Berlow. The answer merely denies that the work was performed in a good and workmanlike manner and that the work was corrected as required. Nowhere in the answer is the allegation of agency denied.

The first of the year was a very successful one for the
company. The sales were very good and the profits were
very high. The company was very pleased with the results
of the year and was looking forward to a similar
success in the future.

The second of the year was also a very successful one for the
company. The sales were very good and the profits were
very high. The company was very pleased with the results
of the year and was looking forward to a similar
success in the future.

The third of the year was also a very successful one for the
company. The sales were very good and the profits were
very high. The company was very pleased with the results
of the year and was looking forward to a similar
success in the future.

The fourth of the year was also a very successful one for the
company. The sales were very good and the profits were
very high. The company was very pleased with the results
of the year and was looking forward to a similar
success in the future.

Since the defendants failed to deny the agency of Berlow, it stands admitted, and no evidence on this issue was required. Kelly v. Chicago Transit Authority, 69 Ill.App.2d 316, 217 N.E. 2d 560.

For the foregoing reasons, the judgment of the trial court as to the original complaint and as to the counterclaim is reversed and the cause remanded to the circuit court with directions to enter judgment for the plaintiff in the sum of \$1606.

JUDGMENT REVERSED AND
REMANDED WITH DIRECTIONS.

BURKE, P.J. and GOLDBERG, J. concur.

The first part of the paper is devoted to a general
discussion of the problem. It is shown that the
problem is equivalent to the problem of finding
the minimum of a certain functional. This is
done by means of the method of Lagrange
multipliers. The second part of the paper is
devoted to the construction of the minimum
of the functional. This is done by means of the
method of steepest descent. The third part of
the paper is devoted to the construction of the
maximum of the functional. This is done by
means of the method of steepest ascent.

56730

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DONALD M. NORRIS,	)	Hon. James P. Piragine,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Donald M. Norris (defendant) was found guilty of operating a motor vehicle while under the influence of intoxicating liquor. (Ill.Rev.Stat. 1969, ch.95-1/2, par.11-501(a).) The circuit court of Cook County entered a fine against him of \$100 and costs. His sole contention on appeal is that the evidence failed to prove him guilty beyond a reasonable doubt.

We have carefully considered the evidence which consists of testimony of two police officers regarding defendant's condition as to sobriety and contrary testimony by defendant's wife, three of his friends and defendant himself. The evidence is conflicting but it is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. No error of law is raised and none appears in the record. An opinion by this court would have no precedential value.

The judgment of the circuit court is affirmed in accordance with Rule 23 of the Supreme Court of Illinois. 50 Ill. 2d Rule 23.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.

Abstract Only.

64/49/1

1880

1880-1881

1881-1882

1882-1883

1883-1884

1884-1885

1885-1886

1886-1887

1887-1888

1888-1889

1889-1890

1890-1891

1891-1892

1892-1893

1893-1894

1894-1895

1895-1896

1896-1897

1897-1898

1898-1899

1899-1900

1900-1901

1901-1902

1902-1903

1903-1904

1904-1905

1905-1906

1906-1907

1907-1908

56753

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
GARY L. KELLAS,	)	HONORABLE FRANK R. PETRONE,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE EGAN delivered the opinion of the court.

Defendant, Gary L. Kellas, was convicted in a bench trial of criminal trespass to a motor vehicle. He contends he did not waive his right to a jury trial; the complaint was defective; and the evidence did not prove him guilty beyond a reasonable doubt.

The complaint, filed May 12, 1971, stated in part:

That Garl (sic) L. Kellas, has, on or about 27 Dec., 1970 at 3238 W. Eastwood, Chicago, Ill. committed the offense of Criminal Trespass to vehicle in that he knowingly enter or any of its parts a 1964 Chev., Ser. #45537K161265, City Vehicle Lic. #X-29944, the property of Shizuko Matsushima, without the consent of Shizuko Matsushima in violation of Chapter 38, Section 21-2.

At trial, the following brief exchange occurred:

The Court: Plea of not guilty, jury waived?

Mr. Cooley (Attorney for defendant):
Plea of not guilty, jury waived.

The complainant testified that her 1964 Chevrolet was in "usual" condition when she reported it stolen; that after the police recovered it, "the hood was off and the ignition was pulled out. And the water pump was missing." Her husband, a mechanic, had tools in the trunk which were also missing.

Joseph Stein testified that he owned a garage at 3238 West Eastwood in Chicago. Sometime in December of '70 he saw defendant in the garage. The defendant asked him for a container of

1871

1872

1873

1874

1875

1876

1877

1878

1879

1880

1881

1882

1883

1884

1885

1886

1887

1888

1889

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

1911

1912

1913

1914

gas. He had rented the garage from Stein's wife a month before under the name of "Gary Olsen." The garage was of the "two stall type." He saw defendant in the garage with a red car, which he thought was a Chevrolet. The car "looked like someone was working on it." He never saw the defendant in the garage with any other car. Only he, his wife and the defendant had keys to the garage. He told the police officers about the red Chevrolet and that he thought it was "stolen." There were "parts taken off the car." Upon cross-examination, Mr. Stein testified that he did not actually see the defendant working on the car and that the defendant had given an address when he rented the garage.

Chicago Police Officer Tomaseck testified that he talked to Mr. Stein and observed the vehicle which had no license plates. The Chicago Police Department Communications Center informed him the vehicle was "stolen." He proceeded to 4818 North Ridgeway, the address given him by Mr. Stein, and arrested the defendant.

Gary Kellas, the defendant, testified that he rented the garage for "mechanic work." He never had a conversation with Mr. Stein, was never in the garage when a 1964 red Chevrolet was there, and never worked on such a car.

Absent highly unusual circumstances, an accused whose attorney waives a jury trial in his presence is deemed to have acquiesced and is bound by the action of his attorney. People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397; People v. Suriwka, 2 Ill.App.3d 384, 276 N.E.2d 490. We find no highly unusual circumstances here.



The complaint recites that defendant "without the consent" of the complainant entered her Chevrolet but does not contain the statutory language "without authority." In People v. Harvey, 270 N.E.2d 80, the precisely same contention was made that the defendant makes here. There the Court held that the tests of the sufficiency of a charge are whether it would enable a defendant to prepare his defense and whether it would sustain a plea of judgment in bar of any prosecution for the same offense. The Court concluded that alleging the act was done "without the consent" of the owner sufficiently apprised the defendant that it was done "without authority." See also People v. Wade, 131 Ill.App.2d 415, 264 N.E.2d 898.

Last, we hold that the evidence establishes the defendant's guilt beyond a reasonable doubt. While the witness Stein did not actually see defendant "working on the car," there is sufficient circumstantial evidence to support the judge's finding. The defendant rented the garage under another name; he wanted fuel to heat the garage, from which it can be inferred that he planned to spend some time in the garage; he had one of only three keys to the garage. All the inferences from the evidence pointed toward the defendant's guilt and the trial judge "was not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of reasonable doubt." People v. Russell, 17 Ill.2d 328, 161 N.E.2d 309.

The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

ABSTRACT ONLY.



11 I.A. 3 50

ABST

57094

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JAMES WILLIAMS,	)	Hon. Saul A. Epton,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a jury trial, James Williams (defendant) was found guilty of three armed robberies, attempt armed robbery and murder. These convictions resulted from armed robbery and murder committed upon a Chicago Transit Authority bus by a group of four men including defendant. He was sentenced to 50 to 100 years for murder; 50 to 100 years on each of the three armed robbery charges and five to ten years for attempt armed robbery, with all five sentences to run concurrently. He appealed to this court. This division of the court modified the sentences so that the minimum terms for murder and the three armed robberies were each reduced to 30 years. As modified, the judgments were all affirmed. (People v. Williams, 3 Ill.App.3d 1, 279 N.E.2d 100.) Defendant then filed a post-conviction petition which was dismissed by the trial court without an evidentiary hearing. Defendant appealed this dismissal to the Supreme Court which transferred the appeal here.

Defendant contends that the knowing misuse by the State of "ambiguous evidence of its own witness" was equivalent to the knowing use of perjured testimony, which requires a new trial. Defendant further urges that, although it was "unnecessary and inappropriate" to examine the degree of prejudice to

him resulting from the false testimony, the prejudice was sufficient to necessitate a new trial. In response, the People urge that the petition was properly dismissed because of failure to establish the use of perjured testimony and, therefore, failure to raise a substantial constitutional issue.

The facts are set out in the former opinion of this court. See also the opinion of the Supreme Court affirming the conviction of another defendant involved in the same incident. (People v. Prim, 53 Ill.2d 62, 289 N.E.2d 601.) The crimes in question were committed on November 22, 1968. Defendant's petition alleges that at his trial he testified in his own behalf that he was employed by the Central Watch Service as a security guard and that the company had issued uniforms and a pistol permit to him, also paychecks for his services. It is further alleged that the State called a rebuttal witness named Smith, the timekeeper for Central Watch Service. Smith testified that the only person named James Williams ever employed by his company was deceased; defendant had never worked for the company and had certainly never been issued a permit for a handgun. The petition alleges that the prosecutor depended upon this testimony in his final argument.

The petition also alleges that defendant became employed at Central Watch Service on September 5, 1968 and was terminated November 28, 1968 for failure to report to work. He received four paychecks: on September 15, September 29, October 13 and October 27, 1968. A copy of a payroll stub of September 29 issued to defendant as Employee No. 2760 was appended to the petition showing the social security number of defendant as being 428-84-6604. Also appended to the petition is a copy of



a letter from the United States Department of Health, Education and Welfare, dated January 14, 1971, certifying that no earnings were credited to defendant for the period from July 1, 1968 through December 31, 1968, but verifying his social security number. It appears from this letter that the original application for social security made by defendant showed his name as being Ivory Grace. Upon dismissal of the postconviction petition, the trial court stated that he had no doubt that an honest mistake was made by the rebuttal witness, Smith.

There is no allegation in this record that the testimony of the witness, Smith, was perjurious. (Ill.Rev.Stat. 1971, ch.38, par.32-2.) The allegation in the petition that Smith's testimony "whether constituting knowing perjury or not was entirely false and incorrect" is a pure conclusion. The allegations that the petitioner's conviction "was obtained through the use of false and perjured testimony" and that petitioner was deprived of his "Constitutional Right to adequate representation of counsel" are subject to the same infirmity. (People v. Dudley, 46 Ill.2d 305, 309, 263 N.E.2d 1.) There is no evidence that the witness knew that his testimony was not correct. Defendant in effect acknowledges this because in his brief he described the rebuttal testimony as being "erroneous" or "ambiguous." In addition, there is no showing that the prosecutor was aware at the time that the testimony was erroneous.

Under these circumstances, the reliance of defendant upon authorities such as Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 is misplaced. In Napue, an accomplice testified that he was not given any promise of leniency by the State's Attorney. Since such promise actually was given, it is evident that the testimony was, therefore, false and perjurious and that the prosecutor, as promissor, certainly had

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

knowledge of this fact. Entirely to the contrary, in the case at bar, we are not dealing with false or perjured testimony, but with testimony that was either incorrect or erroneous. In addition, there is no showing in the case at bar that the State's Attorney had any knowledge even of this.

It follows that the postconviction petition was properly dismissed. In People v. Frank, 48 Ill.2d 500, 272 N.E.2d 25, an informer testified falsely but the postconviction petition did not allege that the prosecution knowingly permitted this false testimony. A judgment dismissing the petition without an evidentiary hearing was affirmed. In the case at bar, the petition is weaker than in Frank because the testimony in question was not perjurious or false but at most was erroneous.

There is another requirement which impels us to affirm dismissal of this petition. Under the law of Illinois, as it formerly existed, it would be necessary for the petition to demonstrate by the allegations thereof that even if the testimony complained of was perjured "***it was so material to the issue as to have probably controlled the result." (People v. Bracey, 51 Ill.2d 514, 519, 283 N.E.2d 685 discussing People v. Ostrand, 35 Ill.2d 520, 221 N.E.2d 499; People v. Lewis, 22 Ill.2d 68, 174 N.E.2d 197.) However, in Bracey, the Supreme Court expressly held that in an evidentiary hearing upon a postconviction petition, the burden rested upon defendant to establish use of perjured testimony by clear and convincing proof, but that the burden rested upon the State to establish beyond a reasonable doubt that the perjured testimony did not contribute to the conviction. People v. Bracey, 51 Ill.2d 514, 519, 520, 283 N.E.2d 685 citing Chapman v. California, 386 U.S. 118, 17 L. Ed.2d 705, 87 S.Ct. 824.

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

1911

1912

1913

1914

1915

1916

1917

1918

1919

1920

1921

1922

1923

1924

1925

1926

1927

1928

1929

1930

1931

1932

1933

1934

1935

1936

1937

1938

1939

1940

1941

1942

1943

1944

1945

1946

1947

1948

1949

1950

1951

1952

1953

1954

1955

1956

1957

1958

1959

1960

1961

1962

1963

1964

1965

1966

1967

1968

1969

1970

1971

1972

1973

1974

1975

1976

1977

1978

1979

1980

In the case at bar, the strong evidence against defendant shows beyond reasonable doubt that the testimony which he now questions did not contribute to his conviction. Defendant was positively identified by five eyewitnesses, all passengers on the bus. Several of the witnesses even described the identical clothing that defendant wore when he was taken into custody. In addition, there was strong and well corroborated testimony by an accomplice which incriminated the defendant. Defendant had a rifle in his possession when arrested and told the police that he carried it in connection with his duties as a security guard. This was contrary to defendant's own testimony that he was an innocent passenger on the bus and that when he sought to leave during the holdup, a codefendant, Andrew Prim, whom he knew casually "put the rifle on him and he seized it from Prim and ran away." In this type of situation, the assailed testimony of Smith was merely cumulative as defendant was already impeached. The fact of defendant's employment at the time was completely immaterial to the issues at trial.

This petition fails to allege any violation of substantial constitutional rights.

Order dismissing petition affirmed.

BURKE, P.J., and EGAN, J., concur.



ABST.

57127

BERNICE R. BENNETT, Administrator)	
of the Estate of Wilbur Leon Hardin,)	
Deceased,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellant,)	
)	
vs.)	
	)	Hon. Nicholas J. Bua,
EDWARD GEELER, et al.,	)	Presiding.
)	
Defendants-Appellees.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Bernice R. Bennett, Administrator of the Estate of Wilbur Leon Hardin, deceased, appeals from an order dismissing her second amended complaint with prejudice because of failure to serve the statutory notice required prior to commencement of a civil action for damages against a public entity or its employees. (Ill.Rev.Stat. 1969, ch.85, par.8-102, 103.) A factual statement is required.

The facts appear from the allegations of plaintiff's original, amended and second amended complaints as to each of which motions to dismiss were filed and granted. The facts are admitted by the motions to dismiss. (Acorn Auto Driving School, Inc. v. Board of Education, 27 Ill.2d 93, 96, 187 N.E. 2d 722.) The decedent, Wilbur Leon Hardin, was taken into custody by public authorities on July 27, 1969 and confined in a detention center in Chicago. On July 28, 1969, he came to his death as a result of wounds inflicted upon him by a fellow prisoner. The original complaint, filed October 29, 1969, made the City of Chicago and certain police officers parties. Plaintiff served the six month notice required by the statute. Ill.Rev.Stat. 1969, ch.85, par.8-102.

11544

11544

11544

11544

11544

11544

11544

11544

11544

11544

11544

11544

11544

Thereafter, and on December 31, 1969, plaintiff filed an amended complaint against the City of Chicago only and also served an amended notice of the occurrence. On April 30, 1970, plaintiff amended the complaint by adding Count 2 which stated the same cause of action against the sheriff of Cook County. The statutory time having elapsed, no notice was served upon the sheriff. The trial court granted a motion to dismiss this complaint as to the sheriff of Cook County. On April 14, 1971, plaintiff filed a second amended complaint only against Edward Geeler, James Badome and Peter M. De Robertis, all deputy sheriffs employed at the place where the plaintiff's decedent had been detained. The designated period of time having elapsed, no notice, as required by the statute, was served upon the sheriff or upon the employees in question. Thereafter, the trial court granted the motion of defendants to strike and dismiss the suit and the cause was accordingly dismissed with prejudice.

Counsel for plaintiff urge that a cause of action against a municipal corporation is a vested right subject to constitutional protections which cannot be arbitrarily withheld or conditioned; the construction placed upon the statute requiring the service of notice is unreasonable and violative of the fourteenth amendment to the Constitution of the United States and thus deprives plaintiff of due process of law; in the factual situation in the case at bar, application of the statute is unconstitutional and an exception should be granted because of actual notice to the defendants. Defendants urge that the notice provisions of the Government Tort Immunity Act are constitutional and that mere common law notice is not sufficient to satisfy the requirements of the statute.



In our opinion, the constitutionality of this pertinent portion of the statute requiring notice has been established by the highest court of Illinois so that its validity is no longer debatable. (Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437; King v. Johnson, 47 Ill.2d 247, 265 N.E.2d 874.) Other decisions which affirm the constitutionality of this requirement of the statute and which hold that it may not be satisfied by simple common law notice are: Rapacz v. Township High School District No. 207, 2 Ill.App.3d 1095, 278 N.E.2d 540 and Repaskey v. Chicago Transit Authority, ____ Ill.App.3d ____, ____ N.E.2d ____, (Illinois Appellate Court, First District, General No. 56072.)

We have no alternative but to adhere to the established weight of authority and to affirm the judgment of dismissal appealed from.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.



57358

ABST

BUSINESS ASSETS CORPORATION,)	
a corporation,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
)	
v.)	
	)	HONORABLE JOSEPH B. HERMES,
LARRY KORS, d/b/a ARROW SERVICE,	)	Presiding.
)	
Defendant-Appellee.)	

MR. JUSTICE EGAN delivered the opinion of the court:

On July 21, 1971, the plaintiff, Business Assets Corporation, secured a default judgment in the circuit court of Cook County in the sum of \$4000 and costs of suit. On October 13, 1971, the defendant, Larry Kors, doing business as Arrow Service, filed a petition under Section 72 of the Civil Practice Act (Ill.Rev. Stat. 1971, ch. 110, par. 72), asking that the default judgment be vacated because he did not owe the plaintiff \$4000, or any part thereof. On January 10, 1972, the trial court vacated the default judgment of July 21, 1971.

The defendant in his petition to vacate the judgment alleged that on or about May 22, 1971, he attended an auction sale conducted by the plaintiff at the Contractors Furnishings and Carpet Co., 1339 S. Michigan Avenue, Chicago, Illinois; at the sale he purchased merchandise for the total sum of \$2986.40; he deposited the sum of \$260 with the plaintiff and at the close of the sale paid an additional sum of \$1226.40, leaving a balance of \$1500; one of the items of personal property purchased, a steel rack, identified as a "Trk-Rak", was difficult to remove from the premises, and the defendant asked and received permission from the owner of the premises to permit the said "Trk-Rak" to remain on the premises until such time as the balance of \$1500

...the ...
...the ...
...the ...

...the ...
...the ...
...the ...

...the ...
...the ...
...the ...

...the ...
...the ...
...the ...

...the ...
...the ...
...the ...

...the ...
...the ...
...the ...

had been paid and the removal of the "Trk-Rak" had been effected; on or about July 23, 1971, he paid the plaintiff by certified check the sum of \$750 and again, on or about August 13, 1971, he paid to the plaintiff by certified check an additional sum of \$750, thus extinguishing the balance of \$1500 due from the defendant to the plaintiff; on June 17, 1971, plaintiff filed suit against him for the sum of \$4000, alleging a balance due of \$1500 and damages of \$2500 for additional rental for use and occupancy of the premises and the amount necessary to expend for disassembling, removing and storing the said "Trk-Rak". The defendant's petition maintained that the damages, if any, are entirely conjectural and anticipatory and should not be allowed pending a determination by the court of the precise nature and extent of such damages, if any.

The defendant further alleged that the plaintiff brought citation proceedings against the Lake Shore National Bank, and on September 16, 1971, after the defendant had paid the remaining balance of \$1500, the plaintiff secured a judgment against the Bank in the sum of \$1024.75 and costs, which was satisfied in open court; the citation was continued to October 20, 1971, on the plaintiff's recital that there remained due and unpaid the further sum of \$2522.64 on the judgment; the defendant did not owe the plaintiff any money. The defendant asked that the default judgment entered against the defendant on July 21, 1971, should be vacated and set aside and held for naught and the sum of \$1024.75 and costs, paid to the plaintiff by the Lake Shore National Bank on September 16, 1971, should be restored by the plaintiff to the Bank.



The plaintiff filed no responsive pleading to the petition of the defendant. It did, however, file a memorandum of law citing cases to the effect that the defendant must allege facts showing that the entry of the judgment was not due to his negligence. The memorandum recited that the defendant was given notice by the attorneys for the plaintiff advising the defendant of their intention to bring suit, that such notice was by certified letter and by letter delivered by messenger to the defendant's place of business, that defendant received service of summons but failed to appear, that the default judgment was entered against the defendant on July 21, 1971, and plaintiff's attorneys so notified defendant by certified mail, return receipt requested, on July 23, 1971, and that the letter was received by defendant on July 26, 1971; yet defendant waited until October 13, 1971, almost three months later, to file his petition.

The plaintiff did not deny any of the allegations of fact contained in defendant's petition.

The sole argument of the plaintiff is that the trial court erred in vacating the default judgment entered July 21, 1971, because defendant's petition, filed under Section 72 of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110, par. 72), "alleges no facts showing his exercise of due diligence and freedom from negligence in the pursuit of this case."

Although a petition to set aside a default judgment under Section 72 must set forth sufficient facts to show a meritorious defense and due diligence on the part of petitioner (Burkitt v. Downey, 102 Ill.App.2d 373, 242 N.E.2d 901), such a petition is always addressed to the equitable powers of the court and only



when there is an abuse of discretion will a reviewing court interfere with the decision. Stackler v. Village of Skokie, 53 Ill.App.2d 417, 203 N.E.2d 183.

In the Burkitt case the court held that even though there may have been a lack of due diligence in presenting a defense, a default judgment may nonetheless be set aside if justice and good conscience require it.

In Gary Acceptance Corp. v. Napilillo, 86 Ill.App.2d 257, 262, 230 N.E.2d 73, the court said:

When it is clear from all the circumstances that a party has procured an unconscionable advantage through the extraordinary use of a court process, the court will excuse the defaulting party for what might otherwise be considered a lack of diligence. In such situations the ends of justice are best served by a contested hearing on the merits.

It is clear from all the circumstances set forth in the defendant's petition that the plaintiff procured an unconscionable advantage over the defendant. The petition shows defendant paid to plaintiff the sum of \$1486.40 at the time of the sale on May 22, 1971, and prior to the time the plaintiff filed suit on June 17, 1971, that he paid the balance of \$1500 shortly after judgment was taken, that at the time the plaintiff brought citation proceedings against the Lake Shore National Bank and received therefrom the sum of \$1024.75, and costs, the full amount of \$2986.40 had been paid and that the plaintiff still represented to the court that the defendant owed the plaintiff the further sum of \$2522.64. In such a situation the ends of justice are best served by a contested hearing on the merits. By not denying any of the allegations of fact contained in



defendant's petition said facts are admitted. Dohl v. Mech, 25 Ill.2d 102, 182 N.E.2d 685.

In Lynch v. Illinois Hospital Services, Inc., 38 Ill.App.2d 470, 475, 187 N.E.2d 330, the court said:

A default should be entered when, as a last resort, it is necessary to give the plaintiff his just demand. It should be set aside when it will not cause a hardship upon the plaintiff to go to trial on the merits.

Under the facts appearing in the record the trial court did not abuse its discretion when it granted defendant's Section 72 petition and vacated the default judgment.

The numerous cases cited by the plaintiff are not applicable to the facts and circumstances presented in the case at bar.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

1st Div
900m.

4/2/73

56583, 57346

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
NORMAN E. HARRIS, Impleaded with	)	HONORABLE ROBERT J. COLLINS,
CORNELL D. GREEN,	)	Presiding.
)	
Defendants-Appellants.))	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Norman E. Harris and Cornell D. Green were indicted for the offense of armed robbery against the persons of Spencer Olson and Willis Groom, in violation of Section 18-2 of the Criminal Code. Ill. Rev. Stat. 1969, ch. 38, par. 18-2. In a bench trial, both defendants were found guilty. Norman E. Harris was sentenced to the Illinois State Penitentiary for a term of years of not less than two years nor more than three years for each offense, the sentences to run concurrently. Cornell D. Green was sentenced in absentia to the Illinois State Penitentiary for a term of years of not less than eight years nor more than fifteen years, each sentence to run concurrently.

Harris and Green filed separate appeals, which have been consolidated in this court.

On July 16, 1970, Harris, Green, and an unidentified person robbed Olson, the owner of a hardware store located at 320 West 63rd Street, Chicago, Illinois. Olson recognized Harris and Green. The robbers took about \$350 from the cash register and also \$25 which Olson had in his pocket. They also took the wallet of Groom, an employee of Olson.

The defendants contend that the discrepancies of the State's witnesses in identifying Harris, as to whether he did or did not have a beard, goatee or mustache, established that the State failed to prove the defendants guilty beyond a reasonable doubt.



The law is well settled that a conviction cannot be sustained if the identification of the accused was vague, doubtful and uncertain. People v. Cullotta (1965), 32 Ill.2d 502, 207 N.E.2d 444; People v. Ikerd (1963), 26 Ill.2d 573, 188 N.E.2d 12.

On the other hand, it has been held that precise accuracy in describing facial characteristics is unnecessary where, as here, the identification is positive. People v. Charleston (1969), 115 Ill.App.2d 190, 253 N.E.2d 91; People v. Miller (1964), 30 Ill.2d 110, 113, 195 N.E.2d 694.

In the case at bar, Harris and Green were both positively identified by Olson and Groom. Olson testified that he recognized Harris and Green; that Harris and Green had been around the neighborhood for about one year; and that he knew their faces but not their names. Groom testified that he had seen the defendants the day before the robbery in front of the store; that he had known Green for about two or three years before the robbery; and that he knew Harris' face.

There is no discrepancy in the testimony of the witnesses for the State as to whether Harris had a beard or a mustache or a goatee on the day of the robbery. Olson testified that he did not know if any of the offenders had a beard and a mustache; or whether Harris had a beard on the day that Harris was arrested. All the other testimony pertaining to the condition of Harris' face is as to the date of the arrest, and not the date of the robbery. Groom testified that Harris did not have a beard or a mustache on the day he was arrested. Police officer Dixon, who arrested the defendants when they were identified by Groom, testified that Harris was dark skinned, slight, light mustache, and that he did not have a beard. Police officer Wilburn, who was present when the defendants were arrested, testified on cross-examination that he did not recall whether Harris had a goatee or mustache. Police Officer Robert Brasky testified for the defense



and said that he investigated the robbery on July 22, 1970, and that at that time Harris had a goatee and a slight mustache, but no beard.

The only conflict is that, at the time of the arrest, Groom said Harris did not have a beard or a mustache, while Dixon testified Harris had a "light mustache" and Brasky testified that Harris had a goatee and a "slight mustache, but no beard."

The trial court, at the close of the trial, said that the testimony of Olson and Groom in substantial matters was not contradicting or inconsistent; they appeared to the court to be credible witnesses and the court was impressed by their testimony; and that the testimony of the alibi witness, Mrs. Marcia Cothran, was unworthy of belief. The court also stated that the evidence presented by the State established beyond a reasonable doubt that these defendants committed this offense. The trial court also stated that it is true the defendant Harris has a small goatee; that it is more under the chin than over it; that on the front view it is difficult to notice; that it is not noticeable in profile; and that the court did not notice it at first until it became an issue in the case.

In light of the observations by the trial court, it is apparent that the question of whether Harris did or did not have a beard, goatee or mustache was of little consequence; and that a victim of a robbery might not be persistently accurate in describing the facial characteristics of Harris. This is especially true, in light of the fact that both Olson and Groom knew Harris and Green prior to the robbery and positively identified them as the individuals who committed the robbery.

In People v. Jones (1972), 4 Ill.App.3d 888, 282 N.E.2d 273, the court sustained the identification of the defendant even though the complaining witness stated that at the time of the crime the defendant did not have a mustache, when the evidence later proved



that he did. In People v. Guyton (1972), ____ Ill.2d ____, 290 N.E.2d 209, the court sustained the robbery conviction even though the victim did not mention that the robber had a mustache, whereas a picture taken of the defendant after his arrest showed he had a small mustache.

The defendants rely on the case of People v. Kincy (1966), 72 Ill.App.2d 419, 219 N.E.2d 662, where the court said that the fact that the complaining witness did not see the mustache on one of the defendants cast a cloud on the certainty of her identification of the defendants as the men who robbed her, and that those are characteristics which one would ordinarily notice if one had a good look at persons' faces. In the Kincy case, the defendant had a "very prominent black mustache" and the court there held that was something which could not normally be overlooked. In the case at bar, those witnesses who testified that Harris had a goatee or a mustache described the mustache as "a slight mustache" or "a light mustache." The trial court, who had an excellent opportunity to observe the facial characteristics of Harris during the trial, stated that Harris had a small goatee; that it was more under the chin than over it; that on the front view it was difficult to notice; that it was not noticeable in profile; and that the trial court did not notice it at first until it became an issue in the case. Under such circumstances it is understandable that Olson testified he did not know whether Harris had a beard at the time of the robbery and that Groom testified that Harris did not have a beard or a mustache on the day he was arrested. However, these discrepancies are inconsequential where, as here, the defendants were positively identified as the robbers.

The evidence adduced at the trial reveals that there was sufficient competent evidence, if believed, from which the trial court could find the defendants guilty of armed robbery beyond a reasonable doubt.

Green also contends "that the sentence he received was not



consistent with the principle of dispensing equal justice under the law" because Harris received a sentence of two to three years on each of the armed robbery offenses, the sentences to run concurrently, while the trial court, in absentia, sentenced Green to a term of eight to fifteen years on each of the armed robbery offenses, the sentences to run concurrently.

The record discloses that Green had been convicted and sentenced on previous occasions for various non-felony crimes, while Harris had no previous criminal convictions.

Although the court has the authority under Supreme Court Rule 615 (Ill. Rev. Stat. 1969, ch. 110A, par. 615(b)) to reduce the sentence imposed by the trial court, this authority should be invoked in those cases where the sentence imposed by the trial court, although within limits prescribed by the legislature, is clearly disproportionate to the nature of the particular offense of which the defendant stands convicted. People v. Fox (1971), 48 Ill.2d 239, 269 N.E.2d 720; People v. Blumenthal (1971), 1 Ill.App.3d 189, 273 N.E.2d 668; People v. Gibbs (1972), 7 Ill.App.3d 517, 288 N.E.2d 70.

Green cites the case of People v. Steg (1966), 69 Ill.App.2d 188, 215 N.E.2d 854. There the court stated that when there is no basis either in the records of the individuals involved or in the nature of the participation of crime which would justify a more severe sentence as to one of equal participants in the crime, a sentence which arbitrarily imposes greater punishment or penalty upon one or more individuals than another should not be approved. That is not the situation in the case at bar. Harris had no previous criminal convictions, while Green had been convicted on many previous occasions.

Green also relies on the case of People v. Freeman (1964), 49 Ill.App.2d 464, 200 N.E.2d 146, where the defendant, along with twelve other individuals, was convicted of certain robberies. Defendant

The first part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The second part of the paper focuses on the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The third part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The fourth part of the paper focuses on the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The fifth part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The sixth part of the paper focuses on the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

The seventh part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will allow for easy access and retrieval of information when needed.

had been granted probation while his accomplices had been sentenced to the penitentiary for terms of one to three years. Thereafter Freeman violated his probation by failing to report to his probation officer and was sentenced to a term of ten to twenty years. On appeal, the court sustained the revocation of probation. However, because the other defendants received smaller sentences the court, in its discretion, reduced Freeman's sentence to four years to ten years in the penitentiary. Because the court reduced the sentence in the Freeman case, it does not follow that the trial court in the case at bar abused its discretion in giving Green a longer sentence than Harris, when the record discloses that Green had a previous record while Harris had no prior convictions.

Green argues that the trial court penalized him because of Green's failure to be present in court on the date set for sentencing. This statement is not borne out by the record. Rather, the trial court, in passing sentence on Green, said that Green had a record of numerous convictions, even though they were not felony convictions. It is therefore apparent that the reason the trial court gave Harris a lighter sentence than Green is that Green had previous convictions while Harris had no record of convictions and not that Green absented himself from the courtroom on the day of sentencing.

The imposition of sentence is peculiarly within the discretion of the trial court and, unless abuse is shown, this court should not find error in the trial court's determination. People v. Hanserd (1970), 125 Ill.App.2d 465, 261 N.E.2d 317; People v. Smith, Appellate Court, First District, Third Division, Number 56187, opinion November 30, 1972. In the case at bar, the trial court did not abuse its discretion in imposing a greater sentence against Green than against Harris.

There is no reversible error in the record and, therefore, the judgments against the defendants are affirmed.

JUDGMENTS AFFIRMED.

(ABSTRACT ONLY)

11 I.A.³ 54

ABST

(24540—4M—9-75, 16G—0

ABST

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day
of April A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

11.11.11

11.11.11

STATE OF ILLINOIS

FOURTH DISTRICT

Agenda 73-26

Plaintiff-Appellee,

Appeal from
Circuit Court
Sangamon County

Defendant-Appellant.

This is an appeal by the defendant from a denial of post-conviction relief after an evidentiary hearing. The Illinois Defender Project appointed counsel on appeal, has filed a motion to withdraw as counsel for defendant and in the motion asserts that there is no justiciable issue for review and that any request for further review would be frivolous. The motion to withdraw is accompanied by a brief in conforming with the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. The record shows proof of service on the defendant of the motion and the accompanying brief. This court continued the motion to withdraw for a period of sixty days with leave to the defendant to file any further points or suggestions. None have been filed.

Upon direct appeal, this court affirmed the conviction. (People v.



Carlisle, 8 Ill.App.3d 742, 290 N.E.2d 272.) The only issue raised in the direct appeal was the asserted excessiveness of sentence.

The defendant filed a pro se post-conviction petition, requested appointment of counsel, counsel was appointed, the pro se petition was dismissed, leave was given to file an amended petition, and the same was filed by appointed counsel. A hearing was held. The amended petition asserted that a plea of guilty was involuntarily secured, that certain property was seized from the petitioner in violation of his constitutional rights, and that the imposition of eight concurrent sentences is prejudicial. We have examined the issues asserted in the amended petition for post-conviction relief, the record in the original case, and at the post-conviction hearing. We agree with the appointed counsel that this record presents no justiciable issue.

On the issue of multiple but concurrent sentences, we note that the offenses involved are eight separate and distinct offenses that took place at different times, at different places, and involving the theft of different automobiles, belonging to different owners. These offenses are different and individually complete transactions, separately motivated, and are not within the purview of the single course of conduct discussed in People v. Whittington, 46 Ill.2d 405, 265 N.E.2d 679, and like cases.

The assertion of illegal search and seizure has no application to this case for the reason that the trial transcript



establishes consent and for the further reason that the plea of guilty constitutes a waiver of any possible claim of illegal search and seizure. See People v. Donal, 44 Ill.2d 280, 255 N.E.2d 454; People v. Gray, 102 Ill.App.2d 129, 243 N.E.2d 545.

The record contains no evidence that tends to prove that the plea of guilty was coerced.

Accordingly, the petition of the Illinois Defender Project to withdraw as counsel is allowed; and the judgment of the circuit court of Sangamon County is affirmed.

JUDGMENT AFFIRMED.

SMITH, TRAPP, J.J., concur.

11 I.A.³ 54
(24540-41A-9-70)

ABST

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge
HONORABLE HAROLD F. TRAPP, Judge
HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day
of April A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

42211

General No. 11800-11801

Agenda No. 73-35

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee)	
)	
vs	)	Appeal from
	)	Circuit Court
MARK DAMON MILLER,	)	Adams County
)	
Defendant-Appellant)	

MR. JUSTICE SIMKINS delivered the opinion of the Court.

In separate jury trials defendant-appellant Mark Miller was convicted of two burglaries. He was sentenced to an indeterminate term of 7 to 12 years on each conviction, the sentences to run concurrently. The two sentences so imposed were also ordered to run concurrently with a sentence for burglary previously imposed in the Circuit Court of Hancock County. Defendant appeals from each of the sentences imposed by the Circuit Court of Adams County, and the cases were consolidated in this Court for opinion.



The sole issue presented by this appeal is defendant's contention that the sentences are excessive. The record discloses that the present cases constitute defendant's third and fourth burglary convictions as well as several convictions for misdemeanors. He was on parole from a 2 to 6 year sentence to Menard Penitentiary at the time of the commission of the offenses here in question. In view of defendant's criminal record, and his course of criminal conduct while on parole, we cannot say that the sentences imposed were excessive.

A case pending on appeal has not reached "a final adjudication" and under the authority of *People v Bailey* 1 Ill.App.3rd, 161, 273 N.E.2d 74; *People v Lobb* ___Ill.App.3rd, ___, ___N.E.2d___; and *People v Mize* ___Ill.App.3rd, ___, ___N.E.2d ___, the sentencing provisions of Ill. Rev. Stats. (1972 Supp.), Ch. 38, par. 1005-8-1 are applicable to this case. Burglary is now a class 2 felony (Ill. Rev. Stat. (1972 Supp.), Ch. 38, par. 19-1). The authorized penalty for a class 2 felony is a maximum term in excess of one year but not exceeding 20 years and a minimum term not greater than one-third of the maximum term set by the court. The maximum



sentence of 12 years, herein imposed, is within the authorized maximum, but the minimum sentence is in excess of one-third of the maximum.

Therefore, in accordance with the Code of Corrections, the sentence in this case is modified and as modified the minimum is fixed at 4 years and the maximum at 12 years. With the sentence thus modified, the conviction is affirmed and this cause is remanded to the Circuit Court of Adams County with direction to issue an amended mittimus reflecting the foregoing modification.

Conviction affirmed, sentence modified, cause remanded with directions.

Smith, P.J., and Trapp, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 3, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

11 I.A.³ 203

72-127

ABST

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

May 3, 1973

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



No. 72-127

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 19th Judi-
JESSIE ROWELL,	)	cial Circuit, Lake
	)	County, Illinois.
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Jessie Rowell, was indicted for attempted murder and aggravated battery. After entering a plea of not guilty, the defendant withdrew the plea of not guilty and entered a plea of guilty to the aggravated battery charge. The State nolle prossed the attempted murder charge and defendant was sentenced to 1 to 3 years in the penitentiary. The sole issue presented for review is whether there was established an adequate factual basis for the plea as required by Rule 402(c). Ill.Rev.Stat. 1971, ch.110A,par.402(c).

Rule 402(c) provides:

"The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."

No particular kind of inquiry is required by the rule. The court may satisfy itself by inquiry of the defendant or the attorney for the government, by examination of the pre-sentence report, or by any other means which seem best for the kind of case involved.



(Committee Comments, S.H.A., ch.110A, par.402; People v. Dugan (1972), 4 Ill.App.3d 45; People v. Warship (1972), 6 Ill.App.3d 461.) The factual basis may be determined after the plea is accepted. (People v. Warship (1972), 6 Ill.App.3d 461; People v. Price (1973), ^{Ill.App.}292 N.E.2d 752, 753-754.) The language of the rule specifies only that the determination must be made before final judgment is entered. The act of imposing sentence is normally considered the final judgment in a criminal case. See Committee Comments, S.H.A. ch.38, sec.118-1; Ill.Rev.Stat. 1971, ch.38, par. 102-14; Ill.Rev.Stat. (1972 Supp.), ch.38, par.1005-1-12 (Unified Code of Corrections).

The indictment or charge to which defendant pleaded guilty was stated to him by the court at the time the plea was accepted. The charge identified sufficient facts of the crime, so that, if acknowledged as true by the defendant, it could serve as a factual basis. However, defendant did not admit that the facts alleged in the charge were true, but rather only answered that he desired to plead guilty to the charge read. While it could be argued that desiring to plead guilty immediately after the charge alleging the facts of the crime has been read is an admission of those facts and thus satisfies the requirement of determining a factual basis, the better practice would be to have the defendant state what he did (People v. Trinka (1973), ^{Ill.App.}293 N.E.2d 179, 182; People v. Dugan (1972), 4 Ill.App.3d 45, 45-6), or to at least directly admit the facts alleged in the charge.

However, the factual basis was amply revealed by the combined hearing for probation and aggravation and mitigation in which the details of the shooting were disclosed by the victim, the defendant, and two other witnesses. The judge had a thorough understanding of the events of the offense as indicated by his discussion of reasons for denying probation before sentence was imposed.



There thus appears on the record a more than sufficient basis upon which the court could have reasonably reached the conclusion that there was a connection between defendant's acts and the intent with which he acted and the acts and intent required to constitute the offense to which the defendant pleaded guilty. (People v. Hudson (1972), 7 Ill.App.3d 800, 803.) It is not necessary that it appear on the record beyond a reasonable doubt or even by a preponderance of the evidence that the defendant committed the offense to which he pleaded guilty. People v. Hudson (1972), 7 Ill.App.3d 800, 803; People v. Hickman (1972), ^{Ill.App.} 291 N.E.2d 523, 527; People v. Love (1972), 6 Ill.App.3d 577, 581.

We affirm the judgment.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

11 I.A.³ 203

72-193

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 3, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:



No. 72-193.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court for the 17th Judi-
) cial Circuit, Winnebago
ORVILLE EARL BOOTH,) County, Illinois.
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Orville Earl Booth, was convicted of burglary following a jury trial, and sentenced to 2 - 6 years in the penitentiary. He appeals, raising alleged prejudicial closing argument by the prosecutor as the sole issue. We are asked to review the argument as "plain error" although no objections were made by defendant's privately retained counsel at trial. Because of the nature of the argument we have chosen to consider it even though no objection was made. People v. Mackey (1964), 30 Ill.2d 190, 193.

The following portion of the prosecutor's closing argument is challenged:

"We know a lot of checks were taken in this burglary too. We don't know where the checks are now. We know they were taken because they were in the safe prior to the break in.

Now obviously we don't have the checks now because your own good sense tells you that burglars, especially professional burglars, and these are professionals, this was a professional job and there is no getting around that.

This involves some planning; they had to know the lay out of the building. They had to know how to get into the building and how to get to where the safe was, and how to get there



was to bust out this wall. Professional burglars are not going to keep identifiable pieces of the loot around. So, if they got checks, they've got pieces of paper that will identify the loot. They will get rid of that and that's what happened in this case, that's why you don't see any checks in money that was found. Although, they do not deny the money that came out of the burglary --- we will get to that later.

The second thing burglars would do other then (sic) get rid of identifiable things is to count the money, and to divide the money and that's exactly what happened here. That's why there is roughly one half of a share here in Court that was in the Defendant's possession. The only problem was getting rid of the identifiable things, here are these burglars, professionals as they may have been, made a mistake because at the time of the burglary maybe things are going a little fast at the time and they are tearing open obviously envelopes to find money. They tear open this envelope to get some bills and they also tear the ends of the bills off, off of five \$1.00 bills. You heard how these were found by the safe.

You heard then that later that same day just hours after the burglary happened the other end of these bills turned up in the pocket of this Defendant when he is searched at the Rockford Police Department after being arrested.

You say, how did they know to arrest him already. Well, the Defense asked that question when the officer testified and he got the answer. They arrested him on another burglary and when they did they searched him and found the matching pieces of these bills. They don't deny that these pieces matched, it's a little silly to deny it."

The prosecutor's reference to "professional burglars", "these are professionals", a "professional job", went beyond the limit of any reasonable comment on the evidence and constituted error.

(People v. Donaldson (1956), 8 Ill.2d 510, 518.) The implication of prior experience in burglary includes the inference that a defendant committed crimes other than the one charged and further invites the jury to convict a defendant because of his supposed habits rather than upon the proof adduced at the particular trial. Such characterizations by their very nature are likely to be prejudicial. People v. Oden (1960), 20 Ill.2d 470, 484-485.

The defendant, however, has abstracted only the closing argument. In his abstract he has excused the absence of reference to the trial record as "not relevant to the issues on appeal". We

cannot agree either with the statement or the procedure followed. Improper argument may not be reviewed in a vacuum but must be taken in the context of the whole argument and the entire record and when the jury could not, under the record, have reached a different verdict improper argument does not always justify reversal. (People v. Baker (1937), 365 Ill. 328, 334.) To require reversal we must be able to conclude from the entire record and the entire argument of counsel that the defendant was prejudiced to an extent which made his trial unfair. People v. Pearson (1972), 52 Ill.App., Ill.2d 260, 273. See also People v. Robinson (1973), 293 N.E.2d 406.

From our review of the record, the evidence of guilt was so overwhelming that the improper argument could not have affected the result. This is tacitly acknowledged by the failure of the defendant to raise any issue as to guilt or to abstract the trial record except for a particular portion of the closing arguments.

The last paragraph of the quoted portion of the argument stands on a somewhat different footing from the references to "professional". The argument "they arrested him on another burglary" was fairly based on the evidence since defense counsel had brought out the fact that defendant had been arrested for another burglary in the cross-examination of one of the police officers. The particular argument did not amount to prejudicial error. People v. Halteman (1956), 10 Ill.2d 74, 83.

We conclude that in view of the clear and convincing evidence of guilt of the crime charged, the remarks made by the prosecutor in closing argument could not have influenced the result. Nor can we say that the verdict could have been otherwise had the remarks not been made. People v. Naujokas (1962), 25 Ill.2d 32, 38.

We therefore affirm the conviction.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.



11 I.A.³ 274

72-128

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

May 11, 1973

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

11 I.A.³ 274

72-128

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 11, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

MAY 11 1973

No. 72-128

HOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit
) Court of the 16th Judi-
v.) cial Circuit, Kane
) County, Illinois.
OSCAR ROY RATLIFF,)
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Oscar Roy Ratliff, the defendant, was convicted upon his plea of guilty to the offense of indecent liberties with a child (Ill. Rev.Stat. 1971, ch.38,par.11-4(a)(3)), and sentenced to 4-15 years in the penitentiary.

Defendant appeals, claiming that the court committed reversible error when it failed to personally inquire into the voluntariness of his plea; and failed to determine the factual basis for the plea. Defendant also contends that the court abused its discretion in denying probation.

We agree that the record does not show substantial compliance with Supreme Court Rule 402 (Ill.Rev.Stat. 1971,ch.110A,par.402). The court did make some inquiry of the defendant in accordance with sub-paragraph (a) of the rule. It admonished the defendant that he was entitled to a jury trial and stated the minimum and maximum punishment for the offense and received understanding answers. In stating the charge to be "indecent liberties with a child", without further explanation, we doubt that the court



No. 72-128

MAY 11 1973

HOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 16th Judi-
v.	)	cial Circuit, Kane
	)	County, Illinois.
OSCAR ROY RATLIFF,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Oscar Roy Ratliff, the defendant, was convicted upon his plea of guilty to the offense of indecent liberties with a child (Ill. Rev.Stat. 1971, ch.38, par.11-4(a)(3)), and sentenced to 4-15 years in the penitentiary.

Defendant appeals, claiming that the court committed reversible error when it failed to personally inquire into the voluntariness of his plea; and failed to determine the factual basis for the plea. Defendant also contends that the court abused its discretion in denying probation.

We agree that the record does not show substantial compliance with Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch.110A, par.402). The court did make some inquiry of the defendant in accordance with sub-paragraph (a) of the rule. It admonished the defendant that he was entitled to a jury trial and stated the minimum and maximum punishment for the offense and received understanding answers. In stating the charge to be "indecent liberties with a child", without further explanation, we doubt that the court



adequately informed the defendant of the nature of the charge so that the defendant would clearly understand that there were three separate classifications of the offense, the first two requiring no proof of intention, the last (lewd fondling) under which defendant was charged, requiring a specified intent. (See McCarthy v. U.S. (1969), 22 L.Ed.2d 418, 428, 394 U.S. 459, 89 S. Ct. 1166; People v. Mims (1969), 42 Ill.2d 441, 444; People v. Hudson (1972), 7 Ill.App.3d 800, 802.) No reference was made to the defendant's right to persist in his plea of not guilty, or to the fact that if he pleaded guilty that the defendant would not have a trial of any kind. Defendant was not informed that he was waiving his right of confronting witnesses against him. The court apparently relied upon a written waiver form to supply the deficiencies in his admonishment, but as we have previously held, this is not substantial compliance with the rule. People v. Cummings (1972), 7 Ill.App.3d 306, 308.

Further provisions of section 402(b) were not substantially complied with. Rule 402(b) not only requires the court to determine that the plea is voluntary before accepting it, but it also expressly requires the court by questioning the defendant personally in open court to confirm that there is no plea agreement, and to determine whether any force, threats, or promises, apart from a plea agreement, were used to obtain the plea. The record shows no inquiry which could properly satisfy these requirements. Moreover, the colloquy between the court and the defendant at the time the court accepted the plea raises affirmative doubts about the voluntariness of the plea. After informing the defendant of the possible sentence involved the court inquired:

"THE COURT: And knowing that, you want to enter a plea of guilty?

THE DEFENDANT: I guess I will have to.

THE COURT: And admit that you took indecent liberties with a child?



THE DEFENDANT: Well, I imagine I just have to.

THE COURT: Well, nobody has to do anything. It has to be your voluntary act. Do you understand that?

THE DEFENDANT: Yes.

*** "

The court then inquired whether defendant's attorney had gone over the matter with the defendant, whether defendant had any fault to find with his attorney, and whether he wanted to plead guilty. The court did not ascertain why the defendant felt he had to plead guilty nor did it directly inquire whether any threats, force or promises had been made.

There are further circumstances in the record and known to the trial judge which would make it appear that the defendant had some doubts about his own guilt and which made it particularly incumbent on the court to assure itself that the plea was voluntarily made. For example, the court was aware of defendant's confession and the reports of two psychiatrists for competency in which defendant denied having the requisite intent under section 11-4(a)(3). The reports also indicated that defendant had not finished the sixth grade, was unable to read simple words, and lacked knowledge of courtroom procedure.

We do not rule on the further issues presented by the defendant since there will undoubtedly be a different record after remand.

Under the particular circumstances of this case we find no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's clear understanding of the nature of the charge against him, and his knowing, unequivocal and voluntary plea. (McCarthy v. U.S. (1969), 22 L.Ed.2d 418, 428, 394 U.S. 459, 89 S.Ct. 1166; People v. Mims (1969), 42 Ill. 2d 441, 444; People v. Cummings (1972), 7 Ill.App.3d 306, 308.)



We therefore reverse the judgment below and remand the cause with directions to the court to vacate the plea of guilty previously entered by the defendant and to permit him to plead anew.

Reversed and remanded with directions.

GUILD, P.J. and THOMAS J. MORAN, J. concur.



11 I.A.³ 275

72-177

ABST

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 11, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

No. 72-177

IN THE

MAY 11 1973

APPELLATE COURT OF ILLINOIS
SECOND DISTRICTHOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

DORCIE CRAIG,)	
)	
Plaintiff-Appellee,	)	Appeal from the 17th
	)	Judicial Circuit,
-vs-	)	Winnebago County.
)	
OREADIS CRAIG,	)	Hon. John C. Layng,
	)	Judge presiding.
Defendant-Appellant.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of
the court:

A decree of divorce between the plaintiff and defendant was entered December 29, 1971. On February 18, 1972 the plaintiff filed a petition to hold the defendant in contempt. The original decree made no provision relative to the equities of the joint tenancy property owned by the parties in Rockford, Illinois. The decree did however, reserve the matter of alimony for the further order of the court. At the hearing on the 18th of February, 1972, among other things, it appeared that the plaintiff was making mortgage payments on the joint tenancy property in Rockford. It was represented to the court by attorney for defendant that the court had stated that plaintiff would have to make the monthly payments as she was living there. The court in reply to this statement observed that it was his impression that when the property was sold that the amount paid by plaintiff would be "surcharged against his share." The court then went on to state that he did not intend that she make the entire payment and that the defendant benefit thereby.

Thereupon on March 23, 1972 the court modified the decree by providing that all mortgage payments made by the plaintiff should be credited to her equity in the property, and that portion of the mortgage payments that she paid or would pay should be deducted one-half from the defendant's net share presumably in the event of a sale of the premises.

The defendant appeals contending that the court lost jurisdiction to modify the decree pertaining to the joint tenancy property by order entered more than thirty days after the original decree of divorce.

It appears that the defendant is receiving aid from ADC. She has not filed an appearance or any pleadings in this court. Nonetheless, we will consider the matter on the merits.

In the early case of Barkman v. Barkman (1900), 94 Ill. App. 440, a decree of divorce was entered on October 20, 1899. On April 9, 1900 more than thirty days after the decree and at a different term of the court, the trial court entered an order relative to the real estate of the parties. Upon appeal, the court held at page 441:

"The modification of the decree is clearly one of substance, relating, as it does, to a fixed right of dower and homestead of the wife in the real estate of her husband, and not to the alimony which was allowed by the decree, and the court was without jurisdiction to make it. (Citations)"

Most of the cases dealing with modification of a decree of divorce after the expiration of thirty days from the date thereof pertain primarily to custody, alimony, or support payments. The courts have consistently said in dealing with those issues that the decree may not be modified after the expiration of thirty days unless there are

changed circumstances of the parties. In substance, the courts have further said that it is incumbent upon the petitioner to show such changed circumstances. The situation before us differs from those cases in that the court herein admitted that it had erred in not providing that the payments made by the wife on the mortgage were to be credited to her equity only. The question presented therefore is simply whether or not the court may change the decree in this regard. We do not have a transcript of the hearing at the time the decree was entered and we are therefore unable to ascertain whether the court did or did not state that inasmuch as she was residing in the home of the parties that she should have to pay the mortgage.

In Bratkovich v. Bratkovich (1962), 34 Ill. App. 2d 122, 180 N.E.2d 716, the parties were divorced on October 28, 1957. Both parties petitioned the court to set aside the decree of divorce and the trial court vacated the decree on January 6, 1958. The reunited parties subsequently came to a parting of the ways, and in November of 1960, the defendant sought to expunge the order vacating the divorce decree. The Appellate court held that the trial court was without jurisdiction to set aside the decree of divorce after the expiration of thirty days and reversed the trial court order vacating the decree of divorce. See also Meyer v. Meyer (1951), 409 Ill. 316, 99 N.E.2d 137.

The issue before us involves the vested rights of the parties in their jointly owned real estate. While the decree may be amended after thirty days in the case of fraud, no such allegation appears herein. We therefore



find that the trial court was in error in amending the divorce decree more than thirty days after the entry thereof. Inasmuch as the trial court reserved the question of alimony he could well have entered a decree providing for the payment of alimony in the sum of \$50 a month but it could not be made a lien upon the real estate.

REVERSED and REMANDED.

J. SEIDENFELD and J. MORAN Concur.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAY 25 1973

Walter T. Shinn
Clerk of the Court

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,)	Appeal from the Circuit Court of
-vs-)	Shelby County.
HARVEY DALE HOLLAND,)	
Defendant-Appellant.)	Honorable Daniel Dailey,
	Judge Presiding.

PER CURIAM:

Appellant Harvey Dale Holland was charged with driving without a valid driver's license and fleeing or attempting to elude a police officer. A two-count information was filed by the State's Attorney of Shelby County, Illinois. Trial by jury was held in the Circuit Court of Shelby County and appellant was convicted on both counts. The court then sentenced appellant to six months imprisonment on each charge, said terms to run concurrently.

The following issues are presented for review: (1) Whether the defendant's arrest for no driver's license was unlawful because there were no reasonable grounds for believing that he was committing any offense; (2) whether the trial court erred in not appointing substitute counsel for the defendant because he did not knowingly and intelligently waive his right to counsel; (3) whether the court erred in failing to transcribe proceedings at arraignment as required by law; and (4) whether the prosecutor improperly introduced evidence of prior convictions.

Some of the above issues present serious problems for this court's consideration. Unfortunately, appellee has not filed a brief in this case.

For the reasons stated in Shinn v. County Bd. of School Trustees of Marion Co., 130 Ill.App.2d 908, 266 N.E.2d 123, we reverse the judgment of the Circuit Court of Shelby County pro forma.

Reversed.

PUBLISH ABSTRACT ONLY.

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885

1884-1885



ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	Hon. Daniel J. White,
CURTIS L. MOORE,	)	Presiding.
)	
Defendant-Appellant.)	

PER CURIAM:

Defendant, Curtis L. Moore, was convicted in a bench trial of the offense of theft. Ill.Rev.Stat. 1969, ch.38, par.16-1(a) (1). He was sentenced to one year in the House of Correction. He appeals.

The record discloses that on August 14, 1971, at about 2:15 a.m., Viola Carmichael was sitting on the first step of the stoop in front of her sister's house at 308 East 59th Street. She saw three boys coming down the street toward her. As they approached, they started scuffling with each other. She took her purse from between her legs and put it alongside her. It contained \$5 and three airplane tickets. As the three passed her, the defendant, Curtis Moore, snatched her purse and all three ran off. The lighting in the area where she was sitting was good. Curtis Moore got right up close to her. Although she did not know his name, she knew him from seeing him in the neighborhood. After learning his first name later that same morning, she reported it to the police, together with his description. Several days later, they apprehended him and brought him to complainant's home. Complainant identified defendant in open court.

Defendant denied having taken her purse. He testified that he had been downtown with three people at a loop movie from 12:45 a.m. to 3:00 a.m. or a little later. His witnesses corroborated his alibi.

Defendant contends: 1) that his identification was tainted because his confrontation with complainant was so unnecessarily suggestive and conducive to mistaken identity as to deny him due process of law and 2) he was not proved guilty beyond a reasonable doubt.

Defendant's initial contention that the pre-trial confrontation between the defendant and complainant at the latter's home

was so unnecessarily suggestive as to taint the in-court identification is without merit. In People v. Robinson, 42 Ill. 2d 371, 247 N.E.2d 898, the court held that questions relating to the pre-trial identification of one suspected of a crime do not arise where the person identified was known to the trial witness prior to the crime, since the identification would be independent of and uninfluenced by any pre-trial confrontation. In the instant case, the complainant testified repeatedly that, although she did not know his name, she knew defendant as a neighbor. Indeed defense counsel at trial conceded the defendant was known to the complainant prior to the crime. The in-court identification was positive and clearly independent of the pre-trial confrontation.

Our review of this record leads us to the conclusion that the essential question was one of credibility of witnesses and needless to say, that issue is for the trier of fact. Upon the issue of whether the evidence was sufficient to convict beyond a reasonable doubt, we find that the evidence was clearly sufficient to convict. No useful purpose would be served by detailing the testimony and the evidence, and accordingly, pursuant to Rule 23, we reject defendant's contention that he was not proved guilty beyond a reasonable doubt. People v. Lobb, --Ill.App.3d--, --N.E.2d-- (Fourth District, No. 11605, February 7, 1973).

The judgment is affirmed.

Affirmed.

PER CURIAM





4/13/73

111A³ 460

56465

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
EARNEST W. HOPE (Impleaded),	)	HONORABLE
	)	EARL E. STRAYHORN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant and L. J. Radcliff were indicted for the offense of burglary, in violation of Section 19-1 of the Criminal Code, Ill.Rev.Stat. 1969, ch. 38, par. 19-1. After a bench trial, both were found guilty, and defendant, who is the sole appellant, was sentenced to a term of four to eight years. Radcliff was admitted to probation for a period of three years.

The issues raised by defendant on appeal are (1) whether he was deprived of his constitutional rights by the prosecutor's use, for impeachment purposes, of statements made at a preliminary hearing, after defendant had withdrawn a pre-trial motion to suppress those statements upon assurance by the prosecutor that the statements would not be used at trial, and (2) whether defendant was improperly impeached upon cross-examination by references to his past felony record.

Prior to trial, defense counsel (representing both defendants), filed motions to suppress statements allegedly made by this defendant at a preliminary hearing and to quash the arrests and suppress evidence. When the trial commenced, the question of the disposition of the motions was considered. The motion to quash the arrests and suppress evidence was taken with the case. After defense counsel stated that he wanted a hearing on his motion to suppress defendant's statements, the motion was apparently



withdrawn when the prosecutor stated that "[w]e will not use it," and "[n]o, we won't use it during the course of the trial." The latter motion had apparently been interposed in the event a severance was not allowed, because the statements were allegedly made solely by defendant and not by Radcliff, and also for the reason that the statements were believed to be inadmissible against the defendant.

Walter Gerwig testified for the state. He was an officer in the Gerwig-Nelson Motors Corporation, a Buick automobile dealership located at 8443 South Ashland Avenue, Chicago. He closed the premises on October 17, 1970, a Saturday, and was awakened by the A.D.T. Service about 2:00 A.M. on October 19 with a message that there was an alarm at the premises. He went there and as he entered the front door, he observed defendant running across the inside of the garage, south to north. Defendant opened a window in an apparent attempt to get out, but he was stopped from the inside by a police officer; a second officer was standing outside the window at the time. Defendant was placed under arrest. The witness did not know defendant at that time nor had he given him permission to enter the premises after closing hours. The witness also observed Radcliff in a police vehicle after defendant had been arrested.

On cross-examination, the witness related that the lighting conditions at the premises were "very good, well lighted," and that half the lights at the agency had been left burning. He did not see Radcliff in the building nor did he see defendant carrying anything while inside the building. Two adding machines had been taken from the premises which were not recovered. The witness saw Officer Satella chasing defendant inside the building.

On redirect examination, the witness stated that a window on the east side, or alley side, of the building was found open.



Chicago Police Officer Steven Satella testified for the state. He and his partners, Officers Townsend and Sims, received a call from A.D.T. that the burglar alarm had sounded at the premises in question about 2:00 A.M. on October 19, 1970. He went to the overhead doors of the service area and saw Radcliff, who was inside, run toward a broken rear window on the alley side of the building; he called that information to Officer Sims, who then pursued Radcliff into the next block. After Sims returned with Radcliff, the witness and Sims entered the premises through the broken window and when they saw defendant running inside the premises, they gave chase. Defendant opened a window in an apparent attempt to escape, but was apprehended and placed under arrest. The witness identified a blanket and an axe as items found below the broken window on the night of the incident. The lighting conditions in the agency were very good on the night in question, and he identified Radcliff and defendant as the two men apprehended at the scene.

On cross-examination, the witness stated that the glass which he looked through in the overhead door measured about 15 inches by 20 inches; that the man he observed inside was directly in his line of vision; that the witness was about 100 feet from Radcliff as the latter climbed out the broken window. He was in error in his police report when he identified defendant as the first man he had seen in the agency. He did not see either the axe or the blanket in the possession of either defendant or Radcliff, and no fingerprints were recovered from the axe. About three to five minutes elapsed between the time Officer Sims pursued Radcliff until the time defendant was seen.

Officer Sims' testimony substantially corroborated that of Officer Satella with regard to observing and arresting both



defendant and Radcliff. Both officers stated that at the time they saw defendant in the building, Gerwig had just entered the premises. On cross-examination, Officer Sims was questioned as to his pursuit of Radcliff.

L. J. Radcliff testified in his own behalf. On the night in question he was arrested at 85th Street and Ashland Avenue as he was talking to a young lady. The officer did not tell him why he was being arrested, but returned him to the automobile agency. He later saw "Clarence Foul" in a paddy wagon, whom he had known previously and whom he had seen earlier at the Carl Davis Palace, an entertainment lounge at 87th and Ashland. He denied going into the automobile agency that night or breaking the window.

On cross-examination, he stated that he had seen defendant at the lounge where he had remained until 1:30, when he left with a young lady. The lounge is a long way from his home. He had spoken to defendant while in the lounge and he next saw defendant in the paddy wagon.

Defendant testified in his own behalf. He was arrested between 83rd and 84th Street and Ashland Avenue on the night in question. He did not burglarize the automobile agency that night nor had he entered those premises before.

On cross-examination, defendant testified that he did not tell the police his name when arrested. He also went under the name of "Robert Williams." He gave the police Robert William Hope's address when arrested. That address was where his mother lived, but he did not live there. He remembered testifying at a preliminary hearing. The witness responded in the affirmative to a question relating to whether he had then testified that he had gone inside the Buick agency on the night in question when the officer had held a gun on him and told him to stand in the window. Further questioning from the preliminary hearing transcript



was objected to by defense counsel. Defendant had seen Radcliff at the Carl Davis Palace on the evening in question. When he was asked whether he had seen Radcliff after he left Carl Davis Palace, defendant responded "in the police truck" and "in Carl Davis Palace before the police truck."

The prosecutor then advised the court that the question of whether defendant and Radcliff had seen each other between the Carl Davis Palace and the police truck was a difficult one because defendant would be impeached from the preliminary hearing transcript but the impeachment would be contradictory to the testimony of Radcliff whose trial had not been severed. Defendant then stated that the reason he had testified at the preliminary hearing that he had seen Radcliff was because his counsel at that hearing told him that "we" would have to pay a fine for criminal damage to property. The court noted that the defendant's testimony was contrary to what he had previously said under oath. Defense counsel thereupon represented to the court that the "reason was because of the fact that there had been a previous commitment made between pleading guilty and a \$200 fine." Defendant testified that "this other brother" was not with him at the time of his arrest but that they were on the same street. Further questions propounded from and concerning the preliminary hearing transcript were objected to and the objections were overruled. The prosecutor also asked defendant if he had previously been convicted and sentenced to the penitentiary, which defendant denied, and to which question defense counsel objected. The court thereupon commented, "you wanted to get it in sooner or later." The prosecutor then asked defendant if he had been placed on probation and subsequently sent to the penitentiary for two to five years, and defendant answered in the affirmative.

The first defense contention in this court is that the prosecutor was improperly permitted to use defendant's testimony

at the preliminary hearing for impeachment purposes at trial. Defendant argues that since he relinquished his fifth amendment right to challenge the voluntary nature of statements he had made at the preliminary hearing, upon the assurance of the prosecutor prior to trial and after he was prepared for a hearing on his motion to suppress those statements, it was reversible error for the court to have allowed the prosecutor to use those statements on cross-examination at trial to impeach defendant's direct testimony.

The state contends that defendant, by taking the stand in his own behalf, "opened the door" for the prosecutor to attack his credibility; that the prosecutor stated that he would not use the statements in the state's "case-in-chief"; and that the evidence shows that the statements were voluntarily given, in any event.

Contrary to the state's statement that the prosecutor had agreed not to use the statements only during the state's case-in-chief, he had in fact agreed not to use the statements "during the course of the trial." Based on this agreement, defendant waived his right to a hearing on the voluntariness of the statements made at the preliminary hearing.

While it is true that a defendant will not be permitted to employ the Miranda rule (Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602), as a license to commit perjury, by testifying at trial contrary to previous testimony which was subsequently found inadmissible under Miranda (People v. Byers, 50 Ill.2d 210, 278 N.E.2d 65; Harris v. New York, 401 U.S. 222, 91 S. Ct. 643), there appears to have been a reason apart from whether Miranda warnings were given at the preliminary hearing why a hearing on the motion was desired; defendant had apparently been made offers as to a reduced charge, as represented to the court by defense counsel after the court's comment that defendant's testimony was different from that at the preliminary hearing. Promises of leniency or immunity,

either partial or in full, will render statements made in consideration thereof involuntary and inadmissible. People v. Martorano, 359 Ill. 258, 194 N.E. 505. The prosecutor's agreement not to use those statements thus foreclosed a hearing into the voluntariness of defendant's preliminary hearing testimony. That the trial court took those impeaching matters into consideration is evidenced by his comment that the prosecutor had a right to go into the matter, his overruling of defense objections to those questions, and by the further comment that the defendant testified differently on the two occasions. See People v. Rice, 5 Ill.App.3d 18, 282 N.E.2d 526.

Defendant also contends that he was improperly impeached upon cross-examination by reference to his past felony record, arguing that a prior conviction may be used for impeachment purposes only when proved up by way of an authenticated copy or some record of the conviction, and that the trial court improperly took that evidence into consideration in determining credibility.

It is settled that proof of a prior conviction of an infamous crime for the purpose of impeachment of a defendant's testimony must be made by the record or an authenticated copy of the conviction. See, e.g., People v. Moses, 11 Ill.2d 84, 88, 142 N.E.2d 1. It was, therefore, error for the court to have considered the evidence so elicited for the purpose of impeachment.

While it appears that the trial court was in error as to both of defendant's contentions raised in this court, neither of those matters related directly to the substantive evidence as to defendant's guilt, but only to the question of impeachment of defendant's testimony on his own behalf. On the other hand, the direct evidence of defendant's guilt, as adduced by the state, is so overwhelming that we conclude the errors to have been harmless beyond a reasonable doubt and could not have affected the outcome of the case. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824;



People v. Johnson, 2 Ill.App.3d 965, 275 N.E.2d 649.

The judgment of the circuit court is affirmed.

A F F I R M E D.

(Publish abstract only.)



11 I.A.³ 474

58015

ABST

PEOPLE OF THE STATE OF
ILLINOIS,

Respondent-Appellee,)

vs.)

WALTER J. CROSBY,

Petitioner-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

HONORABLE RICHARD J. FITZGERALD,
Presiding.

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Walter J. Crosby, hereafter called petitioner, appeals the dismissal of his pro se post-conviction petition without an evidentiary hearing. Petitioner was originally charged by two separate indictments with the crimes of robbery, attempt rape and rape. On February 14, 1966, petitioner, represented by private counsel, entered a plea of guilty to both indictments. He was sentenced to concurrent terms of 25 to 50 years for rape, 10 to 20 years for attempt rape and 19 to 20 years for robbery. On September 11, 1969, petitioner filed a pro se post-conviction petition. The public defender was appointed to represent petitioner. On July 2, 1970, the pro se petition was dismissed without an evidentiary hearing. Petitioner appeals that dismissal, arguing that (1) his plea of guilty was involuntary; (2) his representation by the public defender at the post-conviction proceedings was inadequate; and (3) that his sentence is excessive.

Petitioner's first contention is that his plea of guilty was involuntary because it was made only under the stress of the case coming up for trial and was made in reliance upon an unfulfilled promise by the trial judge. When the case was called for trial, on February 14, 1966, the petitioner requested a continuance. The trial judge informed petitioner that he had four prior continuances and denied the request. Thereafter, petitioner entered a plea of guilty. Petitioner now argues that the denial of this continuance



put stress upon the petitioner and this, coupled with petitioner's psychiatric condition as demonstrated by a behavior clinic examination made prior to trial, which characterized him as being a "sociopathic personality disturbance" and a prior psychiatric examination made in 1965 which referred to the petitioner as an "impulsive, unreflective person," combined to make the defendant's plea of guilty involuntary.

The allegation that petitioner's pleas of guilty were made under the stress of being forced to trial does not demonstrate that the pleas were involuntary. The petitioner had obtained four previous continuances and the denial of a fifth continuance was not an abuse of the trial court's discretion. People v. Gore, 6 Ill.App.3d 51, 284 N.E.2d 333. Similarly, petitioner's allegations as to his psychological condition does not demonstrate an involuntary plea. The behavior clinic examination, which was made prior to trial, concludes that the petitioner knew the nature of the charges and was able to cooperate with counsel. Petitioner's previous psychiatric report, which was made in 1965, concluded that petitioner was not mentally ill or in need of mental treatment. Petitioner was represented by a private attorney prior to and at his pleas of guilty. Petitioner's pleas were entered in open court after due admonishment by the trial judge. An examination of the record reveals that the petitioner stated that he was voluntarily pleading guilty without duress and without any promises being made to him. The record demonstrates that petitioner's pleas of guilty were voluntary and intelligently made. People v. Hrebenar, 48 Ill.2d 100, 268 N.E.2d 869.

Petitioner also argues that his pleas of guilty were involuntary because they were made in reliance upon an unfulfilled promise of the trial judge. To support this argument, petitioner relies upon the following colloquy at trial:

THE COURT: Mr. Crosby, your attorney advises me that you wish to change your plea of not guilty to a plea of guilty. Is this correct?



DEFENDANT: I want to be sent where I can get treatments.

THE COURT: Yes, but is this your plea? Do you want to change your plea now from one of not guilty to a plea of guilty?

DEFENDANT: If the court feels that this is the best for me, yes, sir.

THE COURT: It isn't up to the court, Mr. Crosby. You are the one that is going to have to advise the court if you want to plead guilty or not guilty. You have a right to plead guilty or not guilty to these charges and we will give you a trial, but I want you to tell me what you want to do in this case.

The defense argues that this colloquy was a promise by the trial judge to either commit the petitioner to the Department of Mental Health or to give him a reduced sentence to encourage rehabilitation. We cannot agree. After petitioner's statement that he wanted to go where he could get treatment, the trial judge properly admonished the petitioner that the only question at that time was his plea of guilty and he had a right to plead not guilty. After the above colloquy, the petitioner stated that he was under no duress, that no promises were made to him and that he was voluntarily pleading guilty knowing that he waived his right to a jury trial and knowing the possible penalties for each of the crimes. The record shows that the trial court made no promises to petitioner and properly accepted his pleas of guilty.

Petitioner's second contention is that the representation afforded him at the post-conviction proceedings by the public defender's office was inadequate. Petitioner bases this argument upon the fact that counsel did not file a certificate, as required by Supreme Court Rule 651(c), Ill. Rev. Stat. 1969, ch. 110A, par. 651(c), and that counsel was not provided with the transcript of the petitioner's pleas of guilty. Petitioner also argues that the fact that he was represented at various times by three different assistant public defenders and that his pro se petition was not amended demonstrates counsel's inadequacy. The Supreme Court set forth the standard of representation in post-conviction proceedings in People v. Slaughter,



39 Ill.2d 278, 235 N.E.2d 566. There, the court held that an attorney appointed to represent an indigent petitioner must consult with him personally or by mail and must examine the trial record.

In the case at bar, the record affirmatively shows by a direct statement of counsel that he personally consulted with the petitioner at the penitentiary. At the hearing on the State's motion to dismiss the petition, petitioner's counsel argued vigorously, quoting at length from the pleas of guilty, the transcript of which was filed by the State. This demonstrated that petitioner's counsel did have and reviewed the transcript of petitioner's pleas of guilty. People v. Stovall, 47 Ill.2d 42, 264 N.E.2d 174. Petitioner's argument that Supreme Court Rule 651(c) requires the filing of a certificate of petitioner's attorney is without merit. The Rule states that the record filed in the court shall contain a showing which "may" be made by a certificate that the attorney has consulted with petitioner, either by mail or in person. Counsel's statement that he had personally visited petitioner satisfied the Rule. The fact that petitioner was represented at various times by three different assistant public defenders in no way demonstrates inadequacy of counsel. Similarly, the fact that the pro se petition was not amended does not, of itself, demonstrate inadequacy. People v. Smith, 40 Ill.2d 562, 241 N.E.2d 413; People v. Goodwin, 5 Ill.App.3d 1091, 284 N.E.2d 430. The public defender in the case has complied with the requirements of Slaughter and Rule 651(c). We therefore find that petitioner had adequate representation in the post-conviction proceedings. People v. Sullivan, 6 Ill.App.3d 814, 286 N.E.2d 605.

Petitioner's final argument is that his sentence is excessive and should be reduced. Since this point was not raised in the post-conviction petition in the trial court, it may not be raised for the first time on appeal. People v. Turner, 47 Ill.2d 7, 264 N.E.2d 145; People v. Eldredge, 41 Ill.2d 520, 244 N.E.2d 151.



58015

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.





11 I.A.³ 482

No. 56888

ABST

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
THEODORE KOTWASKINSKI,	)	HONORABLE
	)	DAVID A. CANEL,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:

Theodore Kotwaskinski, hereafter called petitioner, appeals the denial of his post-conviction petition. Petitioner was originally charged by indictment with burglary, larceny, attempt burglary and possession of burglar tools. On October 11, 1960, petitioner entered a plea of guilty to all charges and was sentenced to concurrent terms of 10 to 15 years for burglary, 8 to 10 years for larceny, 3 to 5 years for attempt burglary and 1 to 2 years for possession of burglar tools. Petitioner had previously been sentenced to a 9 year term by the federal court. On March 16, 1971, petitioner filed a pro se petition under the Illinois Post Conviction Hearing Act (Ill.Rev.Stat. 1969, ch.38, par.122-1 et seq) alleging that he had been promised that if he entered a plea of guilty to the indictment, his Illinois sentence would run concurrently with his previously imposed federal sentence.

On September 27, 1971, the assistant state's attorney representing the respondent advised the court that he was making an oral motion to dismiss and that he had the petitioner's original trial counsel present in court, ready to testify. Thereafter, petitioner's counsel, who had personally interviewed the petitioner and had a detailed questionnaire from the petitioner, informed the court that he was prepared to proceed. Petitioner's original trial counsel testified without objection that, at the time the petitioner entered his plea of guilty, he was serving a nine year sentence in the federal penitentiary. At that time, the only way that a state sentence could be made concurrent with a federal sentence was for the federal judge to designate the

1884-1885

...

place of incarceration on the federal sentence to be the Illinois State Penitentiary. The state could not designate a state sentence to run concurrently with a federal sentence. He testified that at the petitioner's plea of guilty, the trial judge had indicated that he would recommend to the federal judge that the federal sentence be made concurrent with the state sentence. The defendant was fully advised of these facts by him prior to entering the plea of guilty. Petitioner's original trial counsel also testified that, after the petitioner's plea of guilty, the trial judge did recommend to the federal court that its sentence be made concurrent with the state sentence, but that recommendation was rejected. After the testimony was concluded, petitioner's present counsel stated that the trial court should render its decision based upon the testimony that the court had heard and the petitioner's affidavit, since the petitioner would be the only one to testify. The court then sustained the state's motion and denied petitioner's prayer for relief.

On appeal, the petitioner's only argument is that his post-conviction petition was improperly dismissed because the court went beyond the pleadings in determining the sufficiency of the petition when the court heard the testimony of his original trial counsel and that he had no similar opportunity to present testimony. The petitioner reasons that it is improper to hear testimony on a motion to dismiss and that the hearing was one-sided because the petitioner did not attend the hearing or testify. Although the assistant state's attorney requested a hearing on a motion to dismiss, the trial court in fact held an evidentiary hearing on the post-conviction petition. Petitioner's original trial counsel was present in court and testified without objection, as to the facts surrounding the plea of guilty. Thereafter, the petitioner's counsel, who had personally interviewed the petitioner, stated that the trial court should render its decision based upon the testimony the court had heard and upon the petitioner's affidavit, since the petitioner would be the only

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then goes on to discuss the various factors which have shaped the development of the United States, including the influence of the British, the Spanish, and the French. He also discusses the role of the American people in the creation of the new nation. The paper concludes by stating that the study of the history of the United States is a task of great importance, and that it is one which should be undertaken by all who are interested in the future of the country.

one to testify. The trial court's consideration of the petitioner's original trial counsel's testimony and the petitioner's affidavit constituted an evidentiary hearing under the Post Conviction Hearing Act. After the hearing, the trial court entered an order sustaining the state's motion to dismiss and denying the defendant's post-conviction petition.

The petitioner argues that the hearing was one-sided because he was not present and did not testify. The Post Conviction Hearing Act gives the post-conviction judge wide discretion as to the type of evidence he may receive in ruling upon the allegations of the petition. (People v. Smith, 45 Ill.2d 91, 256 N.E.2d 800.) The trial court may receive proof by affidavit, deposition, oral testimony or other evidence. (Ill.Rev.Stat. 1969, ch. 38, par.122-6.) The trial court may, in its discretion, consider affidavits in lieu of testimony. People v. Humphrey, 46 Ill.2d 88, 263 N.E.2d 77.

In People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285, the trial court held a hearing on petitioner's post-conviction petition based solely upon affidavit. On appeal, the petitioner claimed that this procedure was improper in that neither he nor any of his witnesses were permitted to be present or to testify. In affirming the denial of the post-conviction petition, the Supreme Court held that controverted issues of fact may be tried upon affidavit in lieu of oral testimony.

In People v. Cummins, 414 Ill.308, 111 N.E.2d 307, the petitioner, in his post-conviction petition, alleged that he was coerced to plead guilty by false promises of leniency by the assistant state's attorney. At the hearing on the post-conviction petition, the assistant state's attorney testified. The petitioner was not present and did not testify. Petitioner's affidavit was considered in lieu of his testimony. The Supreme Court affirmed the denial of the post-conviction petition holding that the trial court, within its discretion, properly considered the petitioner's affidavit in lieu of his testimony and that petitioner's presence



was not a procedural or substantive necessity.

In the case at bar, the trial court properly held an evidentiary hearing based upon the testimony of petitioner's original trial counsel and petitioner's affidavit. As in other cases tried by the court without a jury, the credibility of witnesses in a post-conviction hearing is a matter for the trial court to determine and that determination will not be disturbed on review unless manifestly erroneous. (People v. Wease, 44 Ill.2d 453, 255 N.E.2d 426.) Here the trial court obviously found the testimony of counsel that the defendant was fully advised of all of the facts prior to his plea of guilty more credible than the testimony of the petitioner. The defendant was in no way prejudiced by the manner in which a hearing was held on his post-conviction petition.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per curiam.



57453

ABST

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
) Appeal from the Circuit
)
v.) Court of Cook County.
)
)
CHARLES JAMISON,)
) John J. Moran, AJ.
Defendant-Appellant.)

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Charles Jamison was arrested in a National Tea Company store, in Chicago, for stealing meat valued at \$18.40. A cashier noticed Jamison trying to go through the check-out line without paying for the package he was carrying. She called for assistance. A security guard, who had observed Jamison at the meat counter and saw him in a check-out line with a shopping bag full of meat, stopped him as he crossed from one line to another. Jamison said he paid for the meat but he had no receipt; he said the cashier had not given him one.

At his trial Jamison testified that he was taken to a room in the back of the store and, despite being beaten, refused to admit that he stole the meat. He knew that a cashier had called for assistance but said that he had checked out in a line next to hers before the call was made. He explained the lack of a sales slip by saying that on Saturdays the store was very busy and check-out girls often did not bother to put sales slips in bags. He also said that he might have had a receipt which became misplaced or was removed when the bag was emptied by the security guard.

الخطبة
١٥

The court found Jamison guilty and after an aggravation and mitigation hearing which disclosed that he had prior convictions for theft, aggravated assault and unlawful use of weapons, sentenced him to 60 days in the House of Correction.

He contends that the evidence failed to establish beyond a reasonable doubt his unauthorized control over the meat in his possession. He points out that in the National Tea store and at the trial he consistently asserted that he had paid for the meat; that the State's case rested entirely upon the testimony of the security guard; that it did not call the cashiers as witnesses or present the tabulations of the cash registers to support the charge that an \$18.40 purchase had not been made; that no evidence was introduced to rebut his testimony that he was not given a receipt; there was no testimony that the store gave receipts to its customers or that it was its practice to put receipts in bags of food or, if there was such a practice, that the cashier in his check-out line complied with it.

It is the responsibility of the trier of fact to determine the credibility of witnesses. The trial court observed the defendant, listened to his testimony and disbelieved him. There was no obligation on the State to call all the witnesses to the commission of the offense or to produce all the evidence bearing upon it. It was the State's privilege to rely upon the testimony



of but one witness. The State risked its case upon the court's accepting the testimony of the store detective. If the court had doubted his veracity or accuracy or had been impressed with the defendant's, the prosecution would have failed.

With the acceptance of the detective's testimony and the rejection of the defendant's, there was sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. The conviction and the judgment are affirmed.

Affirmed.

McNamara and McGloon, JJ., concur.

of but one witness. The State risked its case upon the court's accepting the testimony of the store detective. If the court had doubted his veracity or accuracy or had been impressed with the defendant's, the prosecution would have failed.

With the acceptance of the detective's testimony and the rejection of the defendant's, there was sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. The conviction and the judgment are affirmed.

Affirmed.

McNamara and McGloon, JJ., concur.





111A³ 536

55910

CHRISTINE E. HARTMAN,	)	ABST
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
)	
v.	)	CIRCUIT COURT OF
)	
ARLIE A. HARTMAN, et al,	)	COOK COUNTY.
)	
Defendants,)	
)	
JAMES E. HARTMAN and JEANETTE	)	HONORABLE
HARTMAN,	)	NATHAN M. COHEN,
	)	PRESIDING.
)	
Defendants-Appellants.)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

James and Jeanette Hartman appeal from an order of the circuit court of Cook County awarding the sum of \$2,476.28 to Hannes and Dorothy Ver Wey as reimbursement for improvements made to the subject real estate located at 13929 Park Avenue in Dolton, Illinois. The order contemplated that the award would be paid out of the proceeds of an eventual sale of the property in question. On appeal appellants urge that the trial court lacked jurisdiction to entertain the petition for the award.

This appeal arose out of one of several claims affecting various parcels of real estate. On this same date we have filed another decision also concerning the subject property. (Hartman v. Hartman, --Ill.App.3d--, No. 54209, 1973.) In that case we decided that the trial court correctly declared a forfeiture of contract against the instant appellants and properly found that they had no interest in the subject property. In that case we recited briefly the background of the litigation. In this case we shall confine ourselves to the facts necessary for the disposition of this appeal.

When Christine Hartman instituted her action for partition, the Ver Weys were made defendants as parties in possession of the subject property. The Ver Weys filed an answer and a third-party complaint. The answers set forth that the Ver Weys had entered into a contract for the purchase of the property in question from James and Mary Beth Hartman. When the time came for the closing of the real estate transaction, James and Mary

Beth were unable to obtain a warranty deed from Christine Hartman. However, the Ver Weys were informed that they would receive the deed shortly, and took possession of the subject property under an agreement with James and Mary Beth to pay a monthly figure \$69.71. The deed was never provided to the Ver Weys. Their third-party complaint requested a specific performance of their contract with James and Mary Beth Hartman. Subsequently, the Ver Weys withdrew their request for specific performance, and petitioned the court for reimbursement for improvements and repairs made to the subject property while they were in possession.

The Ver Weys' petition for reimbursement was set for hearing after the trial court had found that appellants had no interest in the subject property. Appellants' counsel appeared at the hearing but stated that, because the court had found that appellants had no interest in the property, he was refusing to participate in the hearing. The court then heard evidence that the Ver Weys had expended substantial sums in order to keep up the residence and to comply with the building code. After hearing the uncontroverted evidence, the trial judge entered an order awarding the sum of \$2,476.28 as reimbursement to the Ver Weys, this amount to be paid out of the proceeds of the sale of the subject property.

The award to the Ver Weys is not a judgment against the appellants. The money to be received by the Ver Weys is to come from a sale of the subject property. Since we have concluded that the appellants have no interest in the subject property, they cannot be harmed by the award to the Ver Weys. Therefore the issue on appeal is moot.

Additionally, equity, under proper circumstances, has long granted relief against unjust enrichment where an innocent party, due to mistake, has improved the lands of another. Olin v. Reinecke, 336 Ill. 530, 168 N.E. 676. Here the circumstances were clearly proper: the Ver Weys, relying on the representations made by appellants, in good faith expended labor and money to improve the property in question. They are entitled to reimbursement.

Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

DEMPSEY, P.J., and MCGLOON, J., concur.





11 I.A.³ 554

ABST

56962

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
LARRY SMITH, otherwise called)	
JAMES REDMOND,	)	HONORABLE
	)	PHILIP ROMITI,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was charged with robbery of Sam Johnson, armed robbery of Kenneth Walton and aggravated battery on Chicago Police Officer John Kinnas, all three offenses allegedly having occurred on February 6, 1971, within about ten minutes of each other, in violation of Ill. Rev. Stat. 1969, ch. 38, pars. 18-1, 18-2 and 12-4(b)(6). In a consolidated trial he was convicted on all three charges and sentenced to not less than two nor more than eight years on each of the robbery charges and not less than one nor more than three years on the aggravated battery charge, all sentences to run concurrently. The sole issue is whether the defendant was proved guilty beyond a reasonable doubt.

Kenneth Walton testified that about 8:20 P.M. on February 6, 1971, he was coming down the stairs at 1119 South Throop when defendant, whom he had known for 14 or 15 years, asked him for a loan of some money. When Walton refused, defendant picked up a bottle, broke it and put it up to Walton's neck and said he was going to take his money. Another man with defendant, named Jabo, put his arms around Walton, and defendant took between \$75 and \$80 out of his pocket; the two men split the money and both said to him that if he did not go back in the hallway they would mess his face up with the bottle. However, Walton followed the two men to Taylor Street where he saw them "tussling" with Sam Johnson. Walton told Sam Johnson "they had robbed" him too, and Johnson "went to get the police"; shortly thereafter, Walton observed



181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

181-9314

two policemen jump out of a police car, one officer fired his revolver and yelled halt, and he heard two or three shots. He had seen Jabo a few times since this happened, and had so informed the police. Defendant was wearing a green suit, but he was not sure if he was wearing a coat.

Samuel Maurice Johnson testified that on February 6, 1971, at approximately 8:30 P.M., defendant and another man "stopped" him at 956 South Racine as he was walking south toward Roosevelt Road. Defendant and the other man both said to him, "I want your coat." The other man grabbed Johnson and as he was pushing him away "snatched off" his watch; there was a "tussle." Defendant did not attempt to take his wallet but did enter into a struggle with him and when he, Johnson, began to "tussle" then "both of them" pushed him back. Defendant did not reach in Johnson's pocket and never asked him for any money and was wearing a black fur coat and green pants. Johnson ran away and defendant and the other man ran in the opposite direction. Seeing a police car, he told them he had been robbed and got in the police car. When he saw defendant, he pointed him out; the officers got out of their car and asked defendant to stop, but he started to run and one of the officers ran after him.

Chicago Police Officer Alfred Papolito testified that on February 6, 1971, he was on patrol with his partner, Officer Kinnas. He had a conversation with Johnson and along with Johnson they drove north on Racine to Cabrini, turned west and saw defendant; after stopping the car he yelled to defendant to stop. Defendant turned back, "looked at us and started to run" and he chased him about a quarter of a block, then returned to his car and radioed for help. While he was sitting in the squad car with Johnson, he had a conversation with Walton who had come up to the automobile while his partner was chasing the defendant. Defendant was dressed



in a black coat and green pants. When he first observed him, defendant was walking by himself and the only other person he saw was Walton who was about one-third of a block away from defendant.

Chicago Police Officer John Kinnas testified that at about 8:30 P.M. on February 6, 1971, he and his partner were sitting in a police squad car at 956 South Racine when Johnson approached; they had a conversation and then proceeded to approximately 1300 West Cabrini where, after a second conversation with Johnson, he and his partner got out of the squad car and announced their office to defendant who was running. He ordered defendant to stop; defendant stopped, "turned and looked," and began running. Kinnas, who was in uniform and driving a marked squad car, gave chase. After about a block, he fired two shots in the air and yelled, "Stop, police officer." Defendant kept on running until he was tackled; he struck Kinnas in the head and face several times, using his hands and feet. Kinnas fought back but defendant broke loose and began to run again. After a second chase, he caught defendant and placed him under arrest. Defendant was wearing a black coat and a pair of green pants. A search resulted in \$46 in currency, four \$10 bills and six \$1 bills but no watch.

Defendant testified that on February 6, 1971, he saw Walton about 8:00 at night standing by a pool hall with Jabo. They were talking and Walton had a syringe, used for shooting dope, in his hand. Jabo and Walton had an argument "over \$15" and "some bad drugs." Jabo and Walton left together and walked down Lytle and defendant walked down toward Racine. He was arrested but did not struggle with the officer. He was wearing green pants and a black coat that day and did not run when Officer Kinnas got out of the car. There were no broken bottles in the hallway; he



did not take Walton's money. Asked if Jabo took Walton's money, defendant answered: "I can't really say. Kenneth gave him his \$15 back." He did not recall Officer Kinnas yelling "Halt," did not run, Kinnas did not tackle him, he did not punch Kinnas. When Kinnas drove him to the station, Kinnas and another officer jumped on him and started hitting him on the back of the head with a pistol and he was "beat so bad" he couldn't remember who he was.

Opinion

Defendant contends on appeal that any money given him by Walton was with his consent and utterly without the application of any force. This, he argues, is shown because Walton followed his assailants. However, he followed them covertly at a distance. The fact that Walton requested a return of the money from the alleged co-offender does not prove that the transaction was a loan. The fact that Walton saw the alleged co-offender subsequent to the incident does not help defendant's position either, since Walton testified he reported this to the police. In regard to the robbery of Johnson, the evidence makes clear that the defendant did employ force and that he was an active participant in the robbery. Both defendant and Jabo stopped Johnson; both stated "they" wanted Johnson's coat; when Johnson began to struggle, both defendant and the other man pushed Johnson.

On the aggravated battery charge defendant argues that a man in a hurry looks straight ahead, but the testimony presented was to the effect that defendant did in fact look behind, that the officers were in a marked car and in uniform, fired two shots and yelled to Smith to stop. Both officers testified that defendant looked back and Officer Kinnas' testimony about warning shots was corroborated by both Walton and by Officer Papolito.

There was some conflicting evidence but for that reason alone a reviewing court will not substitute its judgment for that



of the trier of fact whose function it is to determine the credibility of the witnesses and the weight to be afforded their testimony. People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631 .

The judgments are affirmed.

AFFIRMED.

Abstract only.



Bar Group

11 I.A.³ 555



No. 57814

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY
)	
vs.)	
)	
FRANK DOPAK,)	HONORABLE
)	LOUIS B. GARIPPO,
Defendant-Appellant.)	PRESIDING.

PER CURIAM (Fifth Division, First District):

After a bench trial, defendant was convicted of burglary in violation of Section 19-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, sec. 19-1), and was sentenced to a term of one to three years.

The Public Defender, who was appointed to represent Dopak on appeal, has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states that the only available issues possible on appeal would be (1) whether the defendant was proven guilty beyond a reasonable doubt, (2) whether the defendant's statement to the police was properly admitted into evidence and (3) whether the motion to quash the defendant's arrest was properly denied.

The brief concludes that an appeal on these issues would be legally frivolous and without merit. The defendant was served with a copy of the motion and brief on January 17, 1973. He was informed that he could file any points he might choose in support of his appeal before March 10, 1973. He has not responded.

Dan Balodimas testified for the State that he is the owner of Dan's Lounge, located at 6007 West Belmont Avenue, Chicago, Illinois. On July 18, 1970, at approximately midnight, he closed his establishment. He checked all the doors and windows and observed that everything was intact. When he returned to his establishment the next morning on July 19, 1970, at approximately 11:00 A.M. he found that the steel bars over the back window had been pried open and entry had been gained by breaking that back window. A rifle and \$200 in cash were missing. He further testified that he did not know the defendant and had never

given the defendant permission to enter his establishment or take anything therefrom.

Richard Heinrich testified for the State that he is a Chicago police investigator and was assigned to investigate the burglary of Dan's Lounge on July 19, 1970. He testified that a fingerprint was taken from the window by which entry was gained into Dan's Lounge and that the fingerprint matched the fingerprint of defendant. (The defense stipulated to the admission of the fingerprint into evidence.) He further testified that in March, 1971, he arrested the defendant on a warrant in an unrelated case and that the defendant subsequently made bond on that charge. The fingerprints taken from the defendant at this subsequent arrest were then matched to the fingerprint found on the window of Dan's Lounge. He then arrested the defendant in April, 1971, at his home. The defendant was given his constitutional Miranda warnings at this time. No conversation occurred at this time. The defendant was then transported to Area 5 burglary headquarters where he was again advised of his constitutional rights. Defendant then admitted the burglary, but stated that the police would have to prove it in court. Prior to the defendant's arrest in April, 1971, Officer Heinrich personally took Mr. Balodimas to 26th and California to obtain a warrant for the defendant's arrest. The warrant was issued by Judge Robert Sulski of the Circuit Court.

Police Officer John Kelly testified for the State that he is the police officer in charge of the warrant section in the State's Attorney's Office. He testified that on March 24, 1971, an arrest warrant was issued for the defendant for the burglary of Dan's Lounge.

The defendant testified on his own behalf that he was arrested in April of 1971 for the burglary of Dan's Lounge, but denied that he was arrested by Officer Heinrich. He testified that he was arrested by two other police officers who did not produce a warrant. He denied committing the burglary.

The trial court in a bench trial found the defendant guilty of burglary and sentenced him to a term of one to three years. After the finding of guilt, but before sentencing, defendant withdrew his previously entered pleas of not guilty in three other indictments, each charging burglary, and entered pleas of guilty to all three indictments. He was then sentenced to concurrent terms of one to three years on each indictment.

The defendant filed a notice of appeal only as to the bench trial and not as to his three pleas of guilty.

The first possible ground for appeal as stated by the Public Defender in his brief is whether the defendant was proven guilty beyond a reasonable doubt. The testimony of Mr. Balodimas clearly established that a burglary occurred on July 19, 1970, at Dan's Lounge. The testimony of Police Investigator Heinrich and the defense stipulation established that defendant's fingerprint was found on the window which was used to gain access to the tavern. The window where the fingerprint was found was not accessible to the general public in Dan's Lounge. The cross-examination of Mr. Balodimas established that even if a patron were to go to the men's room in the rear of Dan's Lounge, he could not approach the window because it was blocked off by boxes. In People v. Taylor (1965), 32 Ill.2d 165, 204 N.E.2d 734, the Supreme Court held that a fingerprint found in an area not open to the public was sufficient to prove a defendant guilty beyond a reasonable doubt. In the case at bar, the defendant offered no explanation as to how his fingerprint could have been found on the window used to gain entry into Dan's Lounge. That area of the lounge was not open to the public. This evidence was sufficient to prove the defendant guilty beyond a reasonable doubt.

The second possible ground of appeal would be whether the defendant's statement to the police was properly admitted. The Public Defender concludes that, since the admissibility of the defendant's statement was not challenged by pretrial motion or at the time it was

admitted into evidence, it therefore cannot be raised on appeal. (People v. Bryant (1968), 101 Ill.App.2d 314, 243 N.E.2d 354.) It should be noted that prior to trial the defense attorney stated that he would make a motion to suppress evidence and a motion to suppress identification during the course of trial. However, nothing was mentioned as to the defendant's statement. Even if this court were to consider the admissibility of the defendant's statement, Officer Heinrich's testimony clearly established that the defendant was given all of his Miranda warnings prior to making the statement. This possible ground for appeal would be without merit.

The third possible ground for appeal would be whether the trial judge acted properly in denying the motion to quash the defendant's arrest. A police officer may arrest a person when he has reasonable grounds to believe that a warrant for the person's arrest has been issued. (Ill. Rev. Stat. 1971, ch. 38, sec. 107-2(b).) Since Heinrich, the arresting officer, had accompanied the complaining witness to the Criminal Courts Building to request a warrant and one was issued by a judge of competent jurisdiction we find this ground for appeal to be without merit.

After the defendant was found guilty, he addressed the court and stated that when he was arrested in March, 1971, by Officer Heinrich, he was interrogated for four hours and was beaten. The defense attorney then stated that the issue of beating did not come up during the trial since no confession or statement resulted therefrom. It was this arrest made with a warrant that gave the police department custody of the defendant and enable it to fingerprint the defendant for comparisons against other burglaries. It is difficult to see how this statement could be the grounds for an appeal, since the alleged beating, even if it did occur, did not lead to any statement being taken from the defendant or any evidence being admitted in the case at bar.

We have examined the record and concur in the opinion of the



57814

Public Defender that none of the arguments thus raised has substantial merit; nor does our inspection of the record disclose any additional possible grounds for appeal which are not also frivolous.

The motion of the Public Defender for leave to withdraw is allowed and the judgment of the circuit court affirmed.

Judgment affirmed.

ABSTRACT ONLY

4/6/11
2.0.0.0
5-11

56031-56089



111.4³ 559

ABST

PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
DONALD R. HILL and	)	HON. Alfonse F. Wells,
DONALD L. WATSON (Impleaded),	)	Presiding.
Defendants-Appellants.))	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Donald Hill, Donald Watson and James Carter were indicted and convicted of the crime of attempt murder. Hill and Carter were sentenced to the penitentiary for terms of not less than one nor more than seven years, and Watson to a term of not less than two nor more than eight years. Carter is not involved in the present appeal.

Hill and Watson have appealed. The following issues are presented for review: 1) whether the People proved the defendants were the perpetrators of the crime beyond a reasonable doubt; 2) whether the trial court's attitude and alleged hostile questioning of a defense witness denied the defendants a fair trial and due process of law; 3) whether the trial court erred in rejecting the testimony of a reputation witness called by defendants and in denying an instruction on reputation testimony; and 4) whether the People proved defendant Donald Hill accountable for the alleged shooting by defendant Donald Watson.

The evidence indicates that on July 14, 1970, the complaining witness Joseph Ippolito was an on-duty Chicago police officer. He was assigned to patrol in a three-wheeled motorcycle around the Columbus Park area in the vicinity of 650 South Central Avenue, Chicago. At 5:30 P.M. on July 14, 1970, he stopped his motorcycle in the park opposite a Chicago Transit Authority bus turnaround.

The officer was sitting on his motorcycle watching a baseball game in the park when a car smashed into his motorcycle.

After the collision, the motorcycle and the car were hooked together. The motorcycle was dragged three or four feet by the car and the officer was thrown from the motorcycle. He further testified that four men got out of the car and began hitting him. The officer identified one of his assailants as defendant James Carter.

Officer Ippolito further testified that after the men beat him, three of them ran away and defendant Carter got back into the car. At this time Donald Watson, defendant herein, got out of the car and fired three or four shots at the officer. While the shots were being fired Officer Ippolito was behind his motorcycle attempting to radio for help. One of the shots allegedly fired by defendant Watson went through the plexiglas (windshield) of the motorcycle and struck the officer in the chest. The bullet caused a scar, but did not enter the officer's body.

After the shots were fired defendant Watson got into the front seat of the car and Donald Hill, defendant herein, drove the car away from the scene. Officer Ippolito subsequently identified the defendants as his assailants at the police station.

Officer Michael Dillon testified for the People that he stopped a cab driver for a traffic violation on July 14, 1970 at approximately 5:30 P.M. As he and his partner, Officer Thomas O'Callaghan were leading the cab driver to the police station to post bond, the defendants hit the cab with their car and hit two or three vehicles on Jackson Boulevard and two more vehicles on Kilbourn Avenue, where the defendants' vehicle finally stopped. Officer Dillon testified that he had previously received a call on his police radio regarding Officer

Ippolito, describing the car involved in the incident. Officers Dillon and O'Callaghan, assisted by other Chicago Police Officers, arrested the defendants and transported them to the police station.

Police Officer Ronald Mudry testified for the People that he was of the opinion that defendants Watson, Hill and Carter had been drinking based on his observation of defendants at the police station after their arrest.

Defendant Donald Hill testified on his own behalf that he had just completed junior college and was entering college on a basketball scholarship. He testified that on July 14, 1970 he drove to the homes of Carter and Watson to pick them up for basketball practice. Defendant Hill testified that while they were at Watson's house, the defendants had "a couple of quarts of beer" but defendant Hill stated that he was not "high" and that he had "control of his faculties." Defendant Hill further testified that as he was driving to the basketball practice, he lost control of the car, struck a cab, and then another car. He denied being in the vicinity of 650 South Central, Chicago, on the date and time in question and further denied any involvement in the attempt murder of Officer Ippolito.

The defendants Watson and Carter testified in their own behalf and substantially corroborated the testimony of defendant Hill. Defendant Carter admitted drinking "quite a bit of alcohol" at defendant Watson's house. Watson denied having any alcoholic beverages on the day in question. Both Watson and Carter similarly denied being in the vicinity of 650 South Central Avenue, Chicago, on the date in question or any involvement in the attempt murder of Officer Ippolito.

The defense called two reputation witnesses. Frank Watts testified he went to high school with defendant Carter, and coached his

basketball team. He testified that he met defendant Hill in College in 1965, and that he had known defendant Watson for a period of six years. The defendants played on the basketball team he coached and a practice session was scheduled for 7:00 P.M. on July 14, 1970. He further testified the defendants all had good reputations for being peaceful and law abiding.

The second reputation witness called by the defense was Edward Badger. Mr. Badger testified that he is an associate professor of physical education and head basketball coach at Wright College. He had known defendants Hill and Watson for five years. Defense Counsel then asked the witness whether he knew the defendants' reputations in the neighborhood where they lived; the People's objection to this question was sustained. The People's objections to defense counsel's questions concerning the defendants' reputations among their fellow classmates and among their acquaintances were also sustained by the trial judge.

The defendants also attempted to call two alibi witnesses, Beverly Watson and Earl Sullivan. The People objected on the basis that defendants had not responded to the People's prior notice of alibi defense. The trial judge sustained the People's objection and alibi witnesses Beverly Watson and Earl Sullivan were not permitted to testify.

On appeal defendants argue that the trial judge's attitude and hostile questioning of defense character witness Frank Watts denied the defendants a fair trial and due process of law.

The record reflects that upon the conclusion of the People's cross-examination of Frank Watts, the trial judge proceeded to examine the witness and the following colloquy occurred:

The first part of the paper discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations. The second part of the paper discusses the methodology used in the study. It mentions the data sources and the statistical methods used. The third part of the paper discusses the results of the study. It mentions the findings and the conclusions. The fourth part of the paper discusses the implications of the study. It mentions the policy implications and the future research.

The study found that the majority of the respondents were male and that the majority of the respondents were from the urban areas. The study also found that the majority of the respondents were in the age group of 18-35 years. The study also found that the majority of the respondents were in the middle income group. The study also found that the majority of the respondents were in the middle education level.

The study also found that the majority of the respondents were in the middle occupation level. The study also found that the majority of the respondents were in the middle social class. The study also found that the majority of the respondents were in the middle cultural level. The study also found that the majority of the respondents were in the middle political level.

The study also found that the majority of the respondents were in the middle economic level. The study also found that the majority of the respondents were in the middle environmental level. The study also found that the majority of the respondents were in the middle technological level. The study also found that the majority of the respondents were in the middle health level.

The study also found that the majority of the respondents were in the middle education level. The study also found that the majority of the respondents were in the middle occupation level. The study also found that the majority of the respondents were in the middle social class. The study also found that the majority of the respondents were in the middle cultural level. The study also found that the majority of the respondents were in the middle political level.

The Court: How many players on your roster?

The Witness: I usually carry about nine or ten.

The Court: How many of them drink beer?

The Witness: I guess all of them.

The Court: That makes a good player?

The Witness: That makes a good player? Our interest was to promote basketball, to bring basket ball players to the West side.

The Court: Drunk or sober, it didn't make any difference.

Defense Counsel: Judge, I have to object to the comments of the Court for the record.

The Court: For the record you have objected, counsel. Thank you very much.

Defense Counsel: The Court is injecting itself in the trial.

The Court: Did the other players all drink beer before practice?

The Witness: I wouldn't know what the other players did, but I know people do drink beer.

The Court: I see. Did Hill ever drink beer?

The Witness: Yes.

The Court: He does. Watson?

The Witness: Yes.

The Court: Carter?

The Witness: Yes.

The Court: Drink beer before practice?

The Witness: Sometimes before and sometimes after.

The Court: Well, this basketball team, that is just a neighborhood group that plays basketball?

The Witness: Right. (Emphasis supplied.)

Defense counsel then moved for a mistrial, which motion was denied.

It is significant to note that neither the defense on direct-examination nor the People on cross-examination interrogated the

character witness Watts concerning the drinking habits of the defendants. This line of questioning was instituted strictly on the trial judge's own initiative. Moreover, the testimony in the record concerning the defendants' "drinking" was in conflict. Police Officer Mudry testified that based upon his observation of the defendants at the police station, he was of the opinion that all the defendants had been "drinking." Defendants Hill and Carter admitted drinking while defendant Watson denied drinking any alcoholic beverages on the day in question.

When viewed in this context, the trial judge's colloquy with character witness Watts is clearly prejudicial to the defendants.

The Illinois Supreme Court in People v. Schultz, 300 Ill. 601, 133 N.E. 379 stated:

"Jurors watch the trial judge closely and generally place great reliance on what he says or does. They are quick to perceive any leaning of the court. Jurors naturally note every remark dropped by the court and every act done by him during the progress of the trial, and invariably they arrive at a conclusion as to what the court thinks about the case. Whatever is said or done by the trial judge is the subject of comment among the jurymen. It is therefore necessary for judges presiding at trials to exercise the greatest care in what they say and do in the presence of the jury lest they give the jury the impression that they favor one side or the other." (People v. Schultz, 300 Ill. 601, 607, 133 N.E.379, 381.)

Moreover, as the Supreme Court stated in People v. Finn, 17 Ill. 2d 614, 162 N.E.2d 354:

"However strong the evidence against an accused may be. . . a fair trial, in all its stages, is a fundamental requirement in a criminal prosecution and when such requirement is not met, it amounts to a denial of due process of law.... It is axiomatic that ultimate decisions of fact must fairly be left to the jury, and to this end it is universally held that judges should refrain from conveying to jurors their personal opinions concerning any disputed question of fact." (People v. Finn, 17 Ill.2d 614, 617, 162 N.E.2d 354, 356.)

See also People v. Santucci, 24 Ill.2d 93, 180 N.E.2d 491.

In the instant case the trial judge's colloquy in general and in particular his remark that "Drunk or sober, it didn't make any



difference" might well have impressed the jury that the trial judge was of the opinion that the defendants were "drunk." In any event, the colloquy when viewed in its totality is of such a prejudicial nature as to amount to a denial of a fair trial and due process of law to the defendants.

Since further proceedings are necessary, at which the alleged errors complained of by defendants may not recur, the only other assignment of error that we need consider is whether the trial court erred in rejecting the testimony of character witness Edward Badger.

The witness Edward Badger was an associate professor of physical education and head basketball coach at Wright College. The record reflects that during defense counsel's direct-examination the following colloquy ensued:

Defense Counsel: Do you know Donald Hill?

The Witness: Yes.

Defense Counsel: Do you know Carter?

The Witness: No, I don't know him.

Defense Counsel: How about Mr. Watson?

The Witness: I know Mr. Watson, yes, sir.

Defense Counsel: And you had occasion to coach Donald Watson and Donald Hill, is that correct?

The Witness: Yes, I have.

Defense Counsel: Now, do you know Donald Watson's reputation for being a peaceful and law abiding citizen?

The Witness: Yes.

Ass't State's Att'y: Judge, I want to object to this.

The Court: Objection is sustained.

Defense Counsel: Do you know Donald Watson's reputation in the community in which he lives for being a peaceful and law abiding citizen?

Ass't State's Att'y: Same objection, Judge.

The Court: Objection is sustained.

Defense Counsel: May I ask the basis?

The Court: You have to lay some kind of foundation.

Ass't State's Att'y: No foundation whatsoever.

Defense Counsel: How long have you known Donald Watson?

The Witness: Approximately five years.

Defense Counsel: Do you - you were with him in school, is that correct?

The Witness: He was with me, really.

Defense Counsel: And you had occasion to go to his home?

The Witness: On occasions I had to drop him off after a late basketball game.

Defense Counsel: And the same with Donald Hill?

The Witness: Yes.

Defense Counsel: And how long a period of time had you known them?

The Witness: Approximately five years.

Defense Counsel: Do you know their reputation in the community in which they live?

Ass't State's Att'y: Same objection, your Honor.

The Court: Objection is sustained.

Defense Counsel: Do you know their reputation at the time they were in school among their fellow classmates?

The Witness: Yes.

Defense Counsel: For being peaceful and law abiding citizens?

Ass't State's Att'y: I object to that.

The Court: Objection is sustained.

Defense Counsel: Do you know their reputation amongst their acquaintances for being peaceful and law abiding citizens?

Ass't State's Att'y: Objection.

The Court: Sustained.

Defense Counsel: That's all.

Ass't State's Att'y: No questions.

The Court: I will ask the jury to disregard all these questions asked, because no proper foundation laid for this witness.

You may step down.

(Emphasis supplied.)

We are of the opinion that the trial judge erred in excluding the testimony of character witness Badger on the basis of improper foundation. The People argue that the testimony was properly excluded because defense counsel failed to establish a foundation showing that the witness Badger's knowledge of the defendants' reputations was based on associations with their neighbors and friends. If this Court were to adopt the position advocated by the People it would mean that a defendant who is unknown to his neighbors and who does not have so-called "friends" would not be able to avail himself of character witnesses. We do not believe the position advocated by the People is salutary or correct.

This Court in Banker v. Ford, 152 Ill.App.12, stated:

"In cities like London, New York and Chicago a man may be absolutely unknown to his next door neighbor and have no acquaintance with any who dwell near him and yet he may the city round have a very extensive acquaintance and be well known in business and social circles. The former limitation of neighborhood in the sense in which it was at one time understood, is no longer of practical application." (Banker v. Ford, 152 Ill.App. 12, 17.)

The Illinois Supreme Court in People v. Reeves, 360 Ill. 55, 195 N.E. 443, stated:

"A man's reputation is the esteem in which he is held in his neighborhood or amongst his associates or those with whom he comes in contact either in a social or business way." (People v. Reeves, 360 Ill. 55, 65, 195 N.E. 443, 448.)

In the instant case defendants' associates were indeed their classmates and we are of the opinion that the character witness

56031

Edward Badger should have been permitted to testify concerning the defendants' reputations based upon his contact with their classmates and acquaintances.

For these reasons, the judgments are reversed and the causes remanded with directions to proceed in a manner not inconsistent with the views expressed herein.

JUDGMENTS REVERSED AND CAUSES
REMANDED WITH DIRECTIONS.

GOLDBERG and EGAN, JJ., concur.



111A³ 560

56114

ABST

STANLEY OPYD,)	
)	
Plaintiff-Appellee,)	
	)	APPEAL FROM THE CIRCUIT
v.	)	COURT OF COOK COUNTY.
)	
VETS GOLD STRIPE MEMORIAL ASSOCIATION,)	
HENRY A. HONACK POST, INC., No. 1583,)	
V. F. W., JOSEPH LAPINSKI, et al.,	)	HONORABLE DAVID A. CANEL,
	)	Presiding.
Defendants-Appellants.)	

MR. JUSTICE EGAN delivered the opinion of the court.

On March 19, 1971, a jury verdict in a personal injury suit was returned "against all defendants" in the sum of \$6000. The defendants named in the complaint and served with summons were Vets Gold Stripe Memorial Association, Henry A. Honack Post, Inc., No. 1583, V. F. W. and Joseph Lapinski. A default judgment order had been entered against Lapinski on April 25, 1967. No damages were assessed at that time. Before trial the defendants, Vets Gold Stripe Memorial Association and Henry A. Honack Post, Inc., No. 1583, V. F. W. filed a petition for a change of venue from Judge David A. Canel, who denied the petition on the ground it did not comply with the statutory requirement that an application for a change of venue shall be made with the consent of three-fourths of the defendants when there are two or more defendants. (Ill. Rev.Stat. 1969, ch. 146, sec. 9.) No post-trial motions were made. The denial of the petition for change of venue is the only assignment of error.

The plaintiff contends that the trial court correctly interpreted the Venue Act in denying the motion and that the defendants waived their objection to the court's ruling by failing to file a post-trial motion.

UPHILL



THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

THE

LIBRARY

OF

THE UNIVERSITY OF

THE STATE OF

NEW YORK

The defendants' answer that they did comply with the numerical requirements of the Act and that no post-trial motion was required under these facts.

Since we conclude that the defendants have waived their objections to the court's ruling, we need not pass on the question of whether the defendants met the requirements of section 9, which was repealed in 1971.

Section 68.1 of the Civil Practice Act (Ill.Rev.Stat. 1969, ch. 110, sec. 68.1) provides:

* * *

(2) Relief desired after trial in jury cases, * * * must be sought in a single post-trial motion. * * * The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief. * * * A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion.

The defendants argue that, since the petition was not part of the actual trial, the statute is inapplicable. If the defendants' position is correct, then any ruling made before trial should be excepted. For example, a ruling on the admissibility of evidence, limiting the number of expert witnesses or striking pleadings made at a pre-trial conference under Supreme Court Rule 218 need not be raised in a post-trial motion. Further, to follow the defendants' argument to its logical extreme, he could have filed a post-trial motion alleging other errors, but excluding the denial of his petition, and still have the point preserved on appeal.

Musolino v. Checker Taxi Company, 110 Ill.App.2d 42, 46-47, 249 N.E.2d 150, while factually inapposite, does contain dictum which supports the plaintiff's position. In that case the plaintiff's petition for a change of venue was denied. A jury returned a verdict in favor of the plaintiff and the defendant's only assignment of error was the denial of the plaintiff's petition. The defendant argued there, as here, that if a petition for a change of venue is improperly denied all proceedings subsequent to that order are void, citing Johnson v. United Motor Coach Company, 66 Ill.App.2d 295, 214 N.E.2d 326 and Hoffman v. Hoffman, 86 Ill.App.2d 374, 230 N.E.2d 77. The court said:

What is really meant by the statements in these cases is that if a petition for change of venue is made in accordance with the statute, and the court erroneously denies the petition for a change of venue, and if judgment is entered against the party seeking the change of venue, the court, upon motion made by the party, must set the judgment aside and will hold it void. However, the rule also is that if a party asks for a change of venue and it is erroneously denied, the party seeking it may waive his rights by not asking afterwards to have the judgment vacated. The judgment is not void ipso facto. (Emphasis added.)

The statute expressly excepts non-jury cases (Section 68.3) and cases in which the jury failed to reach a verdict (Section 68.1 [5].) The Supreme Court created another exception in resolving a conflict between Appellate Court opinions in Keen v. Davis, 38 Ill. 2d 280, 230 N.E.2d 859. In that case the court held that a post-trial motion for a new trial is not a prerequisite to appeal where the trial judge directed a verdict in favor of the defendant. We are now asked to read another exception into the Act by implication.

This we are unprepared to do. For these reasons we conclude that the defendants by their failure to file a post-trial motion waived their right to appeal.

The judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.



ABST.
11 I.A. 590
ABST

NO. 57244

EVELYN BERS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	COOK COUNTY
)	
vs.)	
)	
CHICAGO HEALTH CLUBS, INC.,	)	HONORABLE
a corporation,	)	BEN SCHWARTZ,
	)	PRESIDING.
Defendant-Appellee.)	

PER CURIAM (Second Division, First District):

This is an appeal from an order of the circuit court of Cook County sustaining the defendant's motion for a judgment on the pleadings. On appeal, plaintiff argues that the enforcement of the exculpatory clause contained in a contract entered into between plaintiff and defendant denies her due process of law and that she was not given the opportunity to present evidence as to the circumstances surrounding execution of the contract.

Evelyn Bers, hereafter called plaintiff, originally filed suit against Chicago Health Clubs, Inc., a corporation, hereafter called defendant, for injuries sustained on defendant's premises. Defendant filed an answer which contained the affirmative defense that the plaintiff had signed a contract which contained an exculpatory clause releasing the defendant from all liability for injuries suffered by plaintiff on defendant's premises. Plaintiff filed an answer to defendant's affirmative defense admitting execution of the contract, but arguing that the exculpatory clause was unenforceable because it is against the public policy of the State of Illinois and statutory law in the State of Illinois. Defendant filed a written motion for judgment on the pleadings. Plaintiff filed a written reply to this motion, arguing that the exculpatory clause is unconstitutional as being against the public policy of the State of

Handwritten header or title at the top of the page.

First main section of text, appearing as a list or series of entries.

Second main section of text, continuing the list or entries.

Third main section of text, possibly a sub-list or continuation.

Fourth main section of text, appearing as a single entry.

Fifth main section of text, possibly a sub-list or continuation.

Sixth main section of text, appearing as a list or series of entries.

Illinois and against statutory law in the State of Illinois. The trial court granted defendant's motion for judgment on the pleadings. Plaintiff appeals.

Plaintiff first contends that enforcement of the exculpatory clause denies her due process of law. She argues that the exculpatory clause is unenforceable as being against the stated public policy of the State of Illinois and because there was a disparity of bargaining power between the parties. In Owen v. Vic Tanny's Enterprises (1964), 48 Ill. App. 2d 344, 199 N.E. 2d 280, we considered a case similar to the one at bar. There, plaintiff, a member of defendant's gymnasium, sued to recover for injuries received while on defendant's premises. In answer to plaintiff's suit, the defendant relied upon an exculpatory clause in the membership contract. In holding the exculpatory clause valid and enforceable, we rejected the same arguments that plaintiff advances in this case. In holding that exculpatory clauses in contracts with health clubs are not against the public policy of the State of Illinois, we said:

"If exculpatory clauses in contracts for gymnastics and reducing activities were meant to be 'deemed to be void as against public policy' the legislature would have so provided."

The quoted language was used in 1964. In 1965, the General Assembly expressly dealt with the matter of contracts for Health or Dance Studio services. Ill. Rev. Stat. 1971, ch. 29, pars. 51, 52. While section 52 expressly makes such contracts void for failure to comply as to contents with the provisions of section 51(d), no reference is made in section 52 to an exculpatory clause contained in such contracts. It appears, therefore, that the quoted language is even more apt in 1973.

In the case at bar, plaintiff argues that the public policy of the State of Illinois is evidenced by the enactment of a bill in 1971 which rendered all exculpatory clauses in leases invalid. Ill. Rev. Stat. 1971, ch. 80, par. 91. In

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...

Owen, the plaintiff made a similar argument. There, the plaintiff argued that a 1959 statute, making exculpatory clauses in leases void, set forth the public policy in the State of Illinois. Ill. Rev. Stat. 1959, ch. 80, par. 15(a). We rejected this argument, holding that if the legislature intended all exculpatory clauses to be void, it would have so provided.

In Owen, the plaintiff also argued, as does plaintiff in this case, that the exculpatory clause was not enforceable because there was a disparity of bargaining power between the parties. In rejecting this argument, we said:

"The scarcity of facilities for gymnastic and reducing activities hardly creates such a disparity of bargaining power that plaintiff is forced to accept such terms without alternatives."

In the case before us, plaintiff urges this court to take judicial notice that health studio service contracts are "imposed" insofar as they contain exculpatory clauses. Plaintiff freely and voluntarily entered into a contract which contained an exculpatory clause relieving defendant from liability for injuries sustained by plaintiff while on defendant's premises. There is nothing to show that the contract was "imposed" due to a disparity of bargaining power and we are not persuaded to take judicial notice of such circumstance. Exculpatory clauses in contracts for health club services are not against the stated public policy of the State of Illinois. The exculpatory claim is valid and bars plaintiff's action.

Plaintiff's second contention is that she was never given an opportunity to submit evidence to the trial court as to the facts surrounding the execution of the contract. Plaintiff now maintains that she could have introduced evidence that the contract was imposed due to a disparity of bargaining power between the parties at the time of the execution of the contract. In response to defendant's affirmative defense, the plaintiff filed a written answer and later filed a written reply

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

The second part of the paper is devoted to a discussion of the various theories of the origin of life. These theories are divided into two main classes: the theory of spontaneous generation and the theory of biogenesis. The theory of spontaneous generation is the older of the two and is based on the idea that life can arise from non-life. The theory of biogenesis is the newer of the two and is based on the idea that life can only arise from pre-existing life.

The third part of the paper is devoted to a discussion of the evidence for and against the various theories of the origin of life. It is shown that the evidence for spontaneous generation is weak, while the evidence for biogenesis is strong. It is also shown that the evidence for the theory of evolution is strong, while the evidence for the theory of creation is weak.

The fourth part of the paper is devoted to a discussion of the implications of the various theories of the origin of life. It is shown that the theory of spontaneous generation implies that life is a necessary part of the universe, while the theory of biogenesis implies that life is a mere accident. It is also shown that the theory of evolution implies that life is a necessary part of the universe, while the theory of creation implies that life is a mere accident.

The fifth part of the paper is devoted to a discussion of the various methods of determining the age of the earth. It is shown that the most reliable method is the method of radiometric dating. This method is based on the fact that certain elements decay at a known rate. By measuring the amount of a particular element in a sample, it is possible to determine the age of the sample.

The sixth part of the paper is devoted to a discussion of the various methods of determining the age of the universe. It is shown that the most reliable method is the method of measuring the expansion of the universe. This method is based on the fact that the universe is expanding at a known rate. By measuring the distance to a particular galaxy, it is possible to determine the age of the universe.

to defendant's motion for judgment on the pleadings. In neither of these pleadings did plaintiff argue that the contract was imposed due to a disparity of bargaining power between the parties or that she wished to present evidence of this fact. A litigant cannot, for the first time on appeal, raise an argument which was not presented to the trial court. Pennington v. Alexander, 103 Ill. App. 2d 145, 242 N.E. 2d 788. In the case at bar, the plaintiff cannot now maintain that she was denied the opportunity to present evidence as to the facts surrounding the execution of the contract when, in the trial court, she never challenged the execution of the contract in any way and never asked for the opportunity to present evidence on that issue.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

Publish abstract only.

57355
57853



111A³ 605

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
CARL DAYS, a/k/a CARL FINKLEY,	)	Hon. James J. Mejda,
and ROBERT AUSTIN and EARL SMITH,	)	Presiding.
)	
Defendants-Appellants.)	

PER CURIAM:

Carl Days, also known as Carl Finkley, hereafter called Finkley, and Robert Austin, hereafter called Austin, and Earl Smith, hereafter called Smith, were charged by indictment with the crime of robbery in violation of Section 18-1 of the Criminal Code. Ill.Rev.Stat. 1967, ch.38, par.18-1. At a subsequent jury trial, they were each found guilty of the crime of robbery. Finkley was sentenced to a term of 7 to 15 years in the Illinois State Penitentiary. Austin was sentenced to a term of 7 to 20 years in the Illinois State Penitentiary. Smith was sentenced to a term of 7 to 17 years in the Illinois State Penitentiary. Finkley and Austin appeal to this court together. Smith appeals to this court separately. We have consolidated both cases.

All three defendants raise two common issues: 1) that the trial judge erred in restricting their cross-examination of the complaining witness, and 2) that their sentences were excessive and should be reduced. In addition, defendants Finkley and Austin argue that the trial judge erred in restricting the cross-examination of Sergeant Johnson and that the trial judge erred in allowing the State's Attorney to cross-examine the defendant Austin as to his prior robbery convictions. Defendant Smith also argues that the trial judge erred in failing to inquire of a juror, who was reading a book during the trial, as to the contents of said book and the length of time the juror was so preoccupied.

The facts as adduced at trial follow: Albert Anderson testified that on February 26, 1968, he lived at 5044 South Calumet Avenue, Chicago, Illinois, with his wife, his sister-in-law, his niece (Christine Shelby), her husband, their two

children and a nephew of Mr. Anderson, one James Walker. At approximately 4:00 a.m., he answered a knock at his door. Mr. Anderson opened the door with the latch on and the three defendants forced their way in. Once inside the apartment, the defendants pushed Mr. Anderson into the bedroom and put a pillow over his face. The defendants also put a pillow over Mrs. Anderson's face and burned her legs with cigarettes in an attempt to find out where money was hidden. The men took a yellow metal watch with a black dial and \$20. Mr. Anderson positively identified the three defendants as the men who broke into his apartment.

Laura Anderson, the complainant's wife, testified that on February 26, 1968, in the early morning hours, several men broke into their apartment. The men put pillows over her head and burned her legs with cigarettes in an attempt to force her to tell where the money was hidden. She did not see the faces of the men and could not identify them.

Sergeant Willie Johnson, a Chicago police officer, testified that on February 26, 1968, at approximately 4:15 a.m., he was stopped on the street by Mr. Shelby. Pursuant to a conversation with Mr. Shelby, Sergeant Johnson radioed for help and proceeded to 5044 Calumet. Several other police officers were on the scene. Officer Knightly and Sergeant Johnson ascended the stairs. As they approached the second floor, they saw a revolver. Officer Knightly announced, "Police officers," and as the hand holding the gun came out further, Knightly fired. Once on the second floor, Sergeant Johnson observed James Walker, who had been shot by Officer Knightly. As Johnson proceeded into the apartment, he observed Finkley lying on the floor. A further search of the apartment disclosed that Smith was hiding under a bed.

Christine Shelby testified that on February 26, 1968, she lived with Mr. Anderson at 5044 South Calumet. On that date she got up at about 4:00 a.m. to go to work. At approximately 4:15 she heard a knock on the door and observed three men force their way in as Mr. Anderson answered the door. She went back into her bedroom and woke up her husband and James Walker.

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the

the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

Mr. Shelby went out to call the police. James Walker took a gun and walked to the corner of the apartment, where he observed the defendants coming out of the bedroom. He called to the men to halt and when they proceeded to come at him, he shot the defendant Finkley. The other two defendants ran. One man ran out the door and the other ran into Margie Tate's bedroom. Mr. Shelby positively identified the three defendants as the three intruders on the night in question.

James Walker testified that on February 26, 1968, he was awakened by Mrs. Shelby, who informed him that there were burglars in the house. While Mr. Shelby went to get the police, he took a gun and went to the front of the house. He observed Finkley and Austin come out of the bedroom. He called to the men to stop and shot Finkley when he refused to stop and came toward him. Austin then ran. As Walker proceeded down the hall, he was shot by the police.

Frederick Shelby testified that on February 26, 1968, he was awakened by his wife and informed that there were burglars in the house. He proceeded to go outside and flag down Sergeant Johnson.

Officer George Chota, a Chicago police officer, testified that on February 26, 1968, he responded to a robbery call at 5044 South Calumet. Officer Knightly and Sergeant Johnson proceeded upstairs. Officer Chota thereafter went upstairs and took custody of Smith. In searching Smith he discovered a knife and Mr. Anderson's watch in Smith's pocket.

Officer Zenon Pet testified that on February 26, 1968, he proceeded to 5044 South Calumet. After hearing shots, he proceeded to the third floor, where he observed the defendant Smith with his hand on the door knob. Officer Pet asked Smith what he was doing there and Smith replied that he lived there. After determining that Smith did not live there, he placed Smith under arrest.

The defendant Earl Smith testified that on February 26, 1968, he was at Mr. Anderson's apartment three times in the early morning hours to buy some wine. After purchasing the third bottle of wine from Anderson, he proceeded to the third floor to drink it in the hallway. Shortly after hearing the shots, the police

The first part of the paper discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations. The second part of the paper discusses the methodology used in the study. It mentions the data sources and the data collection methods. The third part of the paper discusses the results of the study. It mentions the findings and the conclusions. The fourth part of the paper discusses the implications of the study. It mentions the practical implications and the theoretical implications. The fifth part of the paper discusses the future research. It mentions the areas for further research and the suggestions for future studies.

came up and arrested him and returned him to the second floor. He denied participating in the robbery or knowing the other two defendants. He also denied that anything was recovered from his person.

The defendant Robert Austin testified that on February 26, 1968, he went to Mr. Anderson's apartment to buy some wine. As he approached Mr. Anderson's apartment he observed that the door was open. As he entered, he observed Finkley in the back of the apartment with his hands up. He heard three shots and ran into Mrs. Tate's bedroom, where he hid under the bed. The police then came in and placed him under arrest. He denied any participation in the robbery.

All three defendants first argue that the trial court erred in restricting their cross-examination of the complaining witness, Mr. Anderson. On cross-examination, the defense asked Mr. Anderson if he had previously been convicted of gambling and of being the keeper of a disorderly house. Objections by the State to both questions were sustained by the trial court. The defendants now argue that they should have been permitted to inquire into these areas to impair the credibility of Mr. Anderson and to show that he was not a man of good character.

The trial court has discretion to restrict the scope of cross-examination. People v. Anderson, 48 Ill.2d 488, 272 N.E.2d 18. Considerable latitude is always allowed in cross-examination of a witness, but the scope of such examination rests largely within the sound discretion of the trial court. People v. Gambony, 402 Ill. 74, 83 N.E.2d 321. It is only where there has been an abuse of discretion resulting in manifest prejudice to the defendant that a reviewing court will interfere. People v. Nugara, 39 Ill.2d 482, 236 N.E.2d 693; People v. Matthews, 7 Ill.App.3d 1059, 238 N.E.2d 901. In the case at bar, after a careful review of the record, we find that the cross-examination of Mr. Anderson was quite lengthy and thorough. We find no abuse of discretion in any limitations imposed by the trial court.

Defendants Finkley and Austin argue that they were improperly restricted in their cross-examination of Sergeant Willie Johnson.

The defense asked Sergeant Johnson if he had ever been served with a subpoena in a civil lawsuit that James Walker had filed against the City of Chicago. The State's objection to the question was sustained. In a conference outside the presence of the jury, the defense attorney was specifically asked by the trial judge whether Sergeant Johnson was a named party to the civil suit. The defense attorney stated that the lawsuit was filed against the City of Chicago, Robert Knightly and other unnamed police officers. We need not decide whether the trial court erred in refusing to allow defendants to impeach Johnson since, even if it were error, it did not result in manifest prejudice to defendants and was not, therefore, grounds for reversal. People v. Nugara, 39 Ill.2d 482, 236 N.E.2d 693. The fact that James Walker had a civil lawsuit pending against the City of Chicago and certain police officers was later stipulated to by the State and was fully argued by the defense in their closing argument to the jury. The defendants now urge that this stipulation is not sufficient because the defense had a right to show that Johnson was a named party to the lawsuit. The defense overlooks the fact that the defense attorney, in a conference with the court, admitted that Johnson was not a named party to the suit, that the suit was filed only against the City of Chicago, Robert Knightly and unidentified police officers. The defendants were in no way prejudiced by any restriction of the trial court on their cross-examination of Sergeant Johnson. People v. Burchette, 4 Ill. App.3d 734, 281 N.E.2d 773.

Defendants Finkley and Austin argue that the trial court erred in allowing the assistant State's Attorney to cross-examine the defendant Austin regarding his three prior robbery convictions. On direct examination Austin testified that in 1954 he was convicted of robbery and received a sentence of two to seven years. On cross-examination the State inquired of Austin how many cases of robbery he had been convicted of in 1954. He admitted that he was convicted upon a plea of guilty of three separate charges of robbery. There was no defense objection to this cross-examination of Austin.

Where a defendant, on direct-examination, admits a prior conviction of an infamous crime, the State on cross-examination

267 N.E.2d 685.

All three defendants finally argue that their sentences are excessive and should be reduced. The power to reduce sentences should be exercised with care and only where it is manifest in the record that the sentence is excessive. People v. Harris, --Ill.App.3d--, (No. 56171, decided February 17, 1973). In the case at bar, all three defendants were convicted of robbery in violation of Section 18-1 of the Criminal Code, the penalty for which is an indeterminate term in the penitentiary of from one to twenty years. Ill.Rev.Stat. 1967, ch.38, par.18-1. Each defendant has an extensive prior criminal record and has previously been incarcerated in the penitentiary on at least two occasions. A review of the facts of the case and the defendants' prior records demonstrate that the trial judge imposed proper sentences.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Judgment affirmed.

PER CURIAM





111.A.³ 606

57822

'ABST

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
) Appeal from the Circuit
)
v.) Court of Cook County.
)
)
TONY WILLIAMS,)
) Robert J. Downing, J.
Defendant-Appellant.)

PER CURIAM:

Tony Williams was charged with attempt robbery in violation of section 8-4 of the Criminal Code. Ill.Rev.Stat., 1969, ch. 38, para. 8-4. He was tried by the court, found guilty and sentenced to a term of one to three years.

The public defender, who was appointed to represent Williams on appeal, has filed a motion to withdraw. The motion, supported by a brief pursuant to Anders v. California, 386 U.S. 738 (1967), states that the only arguable basis for an appeal would be: (1) whether the defendant was deprived of his right to private counsel; (2) whether defendant was advised of his right to have counsel present at the time of his identification; and (3) whether defendant's identification was so unnecessarily suggestive and conducive to mistaken identification that he was denied his constitutional rights.

The brief concludes that an appeal on these issues would be legally frivolous and without merit. The defendant was mailed

copies of the petition and brief on January 4, 1973. He was informed that he could file whatever contentions he wished in support of his appeal by March 21, 1973. He has not responded.

Defendant's first possible argument is that he was denied his right to private counsel. When the defendant was forced to trial, he asked for a continuance because he "might want a paid lawyer." Prior to this time, the defendant had been represented by the public defender for three months who had filed and held hearings on several pre-trial motions without objection by the defendant. The defendant's case had been pending for two years. It was only when the defendant was forced to trial that he requested a continuance to obtain private counsel. Under these circumstances, the denial of the continuance for the defendant to obtain private counsel was not an abuse of the trial court's discretion. People v. Gore (1972), 6 Ill.App.3d 51, 284 N.E.2d 333.

Defendant's second possible argument is that he was not advised of his right to counsel at the time of his identification. The defendant was identified by Mr. Flores immediately after the incident. The Supreme Court has held that, based upon Kirby v. Illinois (1972), 406 U. S. 682, 32 L. Ed. 2d 411, 92 S.Ct. 1877, the failure to provide a defendant with counsel at an identification prior to indictment is not error. People v. Reese, Ill.2d , N.E. 2d (No. 41566, decided March 20, 1973). See also, People v.

Marshall, Ill.App.3d , N.E.2d (Nos. 55604, 55731,
decided January 30, 1973).

Defendant's third possible argument is that his identification was unnecessarily suggestive and conducive to mistaken identification. Leonivo Flores testified that the defendant, in the company of two other people, approached him on the street, struck him and attempted to take his money. A police officer, Thomas Walsh, was on the scene and chased the offenders, who were arrested two and one-half blocks away. The defendant was brought back to the scene where Mr. Flores identified him approximately 20 minutes after the crime. Under these circumstances, the prompt, on-the-scene identification of the defendant was proper. People v. McMath (1970), 45 Ill.2d 33, 256 N.E.2d 835.

We have examined the record and concur in the opinion of defendant's counsel that none of the arguments thus raised has substantial merit and that they are legally frivolous, nor does this court's inspection of the record disclose any additional possible grounds for appeal.

The motion to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



11 I.A.³ 607

ABST

No. 56523

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY
RENE F. NAWODYLO,)	
Defendant-Appellant.)	HONORABLE
	MAURICE LEE,
	PRESIDING.

MR. JUSTICE LORENZ delivered the opinion of the court:

Defendant, Rene Nawodylo, was found guilty in a bench trial for selling an article in violation of the Obscenity Statute. On appeal, the sole issue is whether the article sold was obscene.

The facts are summarized. On August 7, 1969, Police Officer John E. Coughlin purchased a key chain for \$1.05 from the defendant, an employee of a Chicago novelty store. The key chain with an attachment in the form of a horse shoe allegedly depicted a male and female engaged in the act of sexual intercourse and had the words "Lucky Piece" inscribed on it. Shortly after the purchase, the officer returned to the store and arrested defendant for violating Ill. Rev. Stat. 1969, ch. 38, §11-20(a) (1),¹ the Obscenity Statute. The officer also confiscated the remaining half dozen or so key chains.

On January 12, 1970, defendant filed a Motion to Dismiss Complaint on the grounds that his arrest was unlawful and in violation of his constitutional right of free speech and due process of law guaranteed by Article II, Section 4 of the Illinois Constitution and by the First and Fourteenth Amendments to the United States Constitution,

1. §11-20(a) provides in part:

(a) Elements of the offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene ...



that the sale of the publication was protected by these constitutional provisions, that the article is non-obscene as a matter of law, and that the complaint and any prosecution thereunder is violative of due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

Also on January 12, 1970, defendant filed a Petition in Support of a Motion to Suppress Evidence. The petition contended that the arrest and the admission into evidence of the key chain were unconstitutional, absent an adversary judicial hearing conducted prior to the purchase and arrest to determine whether the key chain was obscene. On January 26, 1970, a hearing on the Motions to Suppress and Dismiss was held. After the motions were denied, defendant pleaded not guilty and waived trial by jury. Both parties stipulated that the police officer would testify at trial in the same way as he did at the hearing, i.e., that he bought a key chain on the day in question, at the store in question, and came back and made the arrest of defendant. The key chain was admitted into evidence over defendant's objection. Defendant then moved for a finding of not guilty, for a judgment of acquittal, and for dismissal of the complaint on the ground that the sale of the key chain was constitutionally protected. Defendant further argues that a prior adversary hearing was required. The court denied the Motion to Dismiss. Defendant then testified in his own behalf, relating an account very similar to that of the police officer and testifying that he noticed the key chain, but not what the figures were depicting.

The court found defendant guilty as charged, stating orally in part:

The Court believes that plaintiff's Exhibit 1 does violate the contemporary community standards, and is patently offensive, and does appeal to prurient interest, and is without social value.

A hearing was held in aggravation and mitigation, where it was established

2. The term "publication" is used in the complaint, although defendant correctly points out that the key chain should properly be called an "article."

that defendant had no record of prior arrests or convictions. Defendant was then fined \$500 and placed on probation for two years. After defendant's motion for a new trial was denied, defendant filed this appeal.

OPINION

Defendant raises several issues on appeal. Since we find that the article in question is not obscene, we need not consider the other issues. Obscenity is not within the constitutionally protected area of freedom of speech or press. (Roth v. United States (1957), 354 U.S. 476, 485, 77 S.Ct. 1304, 1309.) Also in Roth the Supreme Court first laid down the guidelines for determining whether an item is obscene or constitutionally protected. The court in Roth held that three factors must exist simultaneously before the subject loses its First Amendment protection. First, the dominant theme of the material taken as a whole must appeal to a prurient interest in sex. Second, the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. Third, the material must be utterly without redeeming social value.

Most of all the Roth standards are statutorily incorporated into Illinois law by means of Ill. Rev. Stat. 1969, ch. 38, §11-20(a) (2), which defines "obsenity."³ We find that the key chain sold by defendant did not appeal to "a shameful or morbid interest" in nudity or sex. At most, the key chain was in poor taste. Further, we would have difficulty in finding that the small figures in the key chain actually depict the action charged in the complaint. However, since the article does not predominately appeal to prurient interest, we reverse the trial court's finding of guilty.

Reversed.

DRUCKER, P.J. and ENGLISH, J., concur.

ABSTRACT ONLY

3. §11-20(b) provides in part:

(b) Obscene defined:

A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters



111A³ 608

57239

AB;

JULIAN J. LUSTER,	)	APPEAL FROM
	)	CIRCUIT COURT
Claimant-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
ESTATE OF SAMUEL S. COHON, DECEASED,	)	HONORABLE
	)	ANTHONY J. KOGUT,
Respondent-Appellant.)	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

This is an appeal by the Estate of Samuel S. Cohon, deceased, from a judgment of the trial court entered on November 19, 1971, allowing the claim of Julian J. Luster in the sum of \$4,764 for rent allegedly due him from the decedent under an oral lease for a one year term.

Although the claimant filed no appearance or brief in this court, the case will be reviewed on its merits. Logan Furniture Mart, Inc. v. Davis, 8 Ill. App.3d 150, 289 N.E.2d 228; Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill. App.2d 264, 254 N.E.2d 814.

Luster, by written lease, let an office in the Metropolitan Building, Suite 700, 134 North LaSalle Street, Chicago, Illinois, to Samuel S. Cohon for the period of May 1, 1960, to April 30, 1961, at a rental of \$175 per month, including stenographic and secretarial services. Annually thereafter, whenever Luster received a lease from the Metropolitan Building, his lessor, for his signature he would, in February or March of each year, confer with Cohon and inform him of the increase in rent and expenses and what the increase in the rental would be if Cohon remained. If Cohon orally agreed to pay the increased rental, Luster would sign the lease with the building.

In February or March of 1970 Luster and Cohon had a conversation in Suite 700, 134 North LaSalle Street, Chicago, Illinois. Luster told Cohon that he had the lease from the building that



had to be signed; that it was for the period of May 1, 1970, through April 30, 1971; that Luster had looked at his records from the operation of the previous year and there would have to be an increase of rental paid by Cohon; and that he had figured out that the increase would be in the amount of \$50. At the meeting in February or March 1970 Luster asked Cohon if he was going to stay after the present term expired. Cohon stated that he was going to stay at the increased rental which was \$397 a month.

Cohon remained in possession of the premises during the months of May and June 1970, and the executrix of his estate occupied said premises until July 31, 1970, when she removed the decedent's filing cabinets, desk, etc., from the premises.

Luster alleged that by reason thereof there was due and owing to him the sum of \$4,764 for rent for the period May 1, 1970, to April 30, 1971.

The trial court held that the lease agreement under consideration was not within the Statute of Frauds; that under the law the landlord had the right to treat this as a holdover tenancy in the absence of any other evidence to the contrary; and that there was no discussion as to the length of time of the lease. The court allowed the claim for \$4,764 as a seventh class claim and the respondent appealed.

The issues on appeal are (1) whether the claimant had the right to treat the decedent's occupancy as a holdover tenancy, and (2) whether the trial court erred in holding that the oral lease agreement was not within the Statute of Frauds.

A holdover tenancy is created when a landlord elects to treat a tenant for a year, after the expiration of his lease, as a tenant for another year upon the same terms as in the original lease. When a tenant holds possession of the premises after the



expiration of a lease, a presumption arises that the tenant continues to hold the premises under such lease, and the law by implication creates a new tenancy from year to year. Madlung v. Jackson, 172 Ill. App. 60, 61; Sheraton-Chicago Corp. v. Lewis, 8 Ill. App.3d 309, 290 N.E.2d 685.

Such presumption, however, is not conclusive and is rebuttable by proof that the tenant held over under a new agreement with the landlord, even though such agreement is unenforceable and void under the Statute of Frauds. Norville v. Dambacher, 35 Ill. App.2d 212, 220, 182 N.E.2d 337; Weber v. Powers, 213 Ill. 370, 385, 72 N.E. 1070.

From the pleadings and the evidence in the case at bar, it is clear that Cohon and Luster met in February or March 1970 and reached an oral agreement regarding the tenancy of Cohon for the year commencing May 1, 1970, through April 30, 1971, with an increased rental of \$50 per month, or a total monthly rental of \$397. This resulted in a new agreement between the parties and, therefore, the trial court erred when it held that there was a holdover tenancy.

The question next arises as to whether the oral lease agreement is enforceable as a lease for the entire year beginning May 1, 1970, and ending April 30, 1971, at a monthly rental of \$397. The law is clear that unless the terms of an oral lease agreement can be completely fulfilled within one year from the date of its making, it falls within the prohibition of Section 1 of the Statute of Frauds and is unenforceable. Lund v. E. D. Etnyre & Co., 103 Ill. App.2d 158, 242 N.E.2d 611 (Petition for leave to appeal denied, 40 Ill.2d 579); Sinclair v. Sullivan Chevrolet Co., 31 Ill.2d 507, 202 N.E.2d 516.

Section 1 of the Statute on Frauds and Perjuries (Ill. Rev. Stat. 1971, ch. 59, par. 1) provides:

That no action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

In the case at bar the claimant alleged that the oral agreement for a new tenancy was made in February or March 1970, while the tenancy thereby created was not to commence until May 1, 1970, and was not to terminate until April 30, 1971. The oral lease could not possibly be performed within one year from the time of its making, February or March 1970, and the time of its termination, April 30, 1971, and it is therefore unenforceable as violative of Section 1 of the Statute of Frauds.

The only remaining question is the amount of rental due to claimant for occupancy of the premises from May 1, 1970, to and including July 31, 1970, the date when all of Samuel S. Cohon's possessions were removed from the premises. When a party enters into a verbal lease which is unenforceable under the Statute of Frauds and agrees to pay rent on a monthly basis as it accrues, he becomes a tenant from month to month. In Marr v. Ray, 151 Ill. 340, 37 N.E. 1029, the court held that where a parol lease is made fixing the amount of rent per month and the time of its payment, but fixing the term at a greater period than one year, it is clearly within the Statute of Frauds; the tenant entering under such unenforceable contract, and paying rent at the sum fixed by the contract, becomes a tenant from month to month. Other cases to the same effect are Seaver Amusement Co. v. Saxe, 210 Ill. App. 289; Mollitor v. C. M. Thom Van Co., 118 Ill. App. 293, 296-297.

In light of the foregoing, the oral agreement between Luster and Cohon resulted in a month to month tenancy and, accordingly,



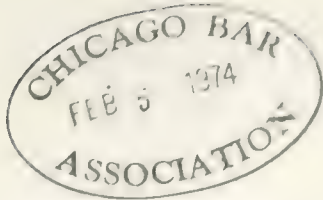
57239

the respondent owes the claimant rent at the rate of \$397 a month from May 1, 1970, through July 31, 1970, for a total of \$1191.

Therefore, the judgment is reversed and the cause remanded with directions to enter a new judgment in favor of claimant in the amount of \$1191.

REVERSED AND REMANDED WITH DIRECTIONS.





111A³ 609

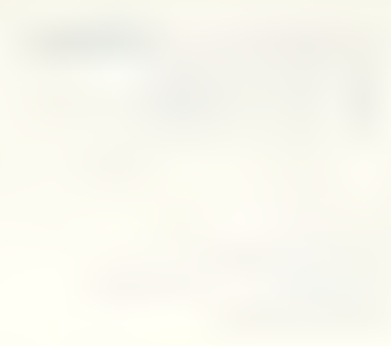
57458

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM	ABST
	)	CIRCUIT COURT	
Plaintiff-Appellee,	)	OF COOK COUNTY.	
)		
v.)		
)		
MAURICE STEVENSON (Impleaded),	)	HONORABLE	
	)	ARTHUR L. DUNNE,	
Defendant-Appellant.)	)	PRESIDING.	

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Maurice Stevenson, the defendant, was indicted along with Willie Wilder for the September 25, 1970, armed robbery of Otis Nevils in violation of Ill. Rev. Stat. 1969, ch. 38, par. 18-2, in that they, "by the use of force and while armed with a dangerous weapon, took an automobile, two rings and a wallet containing identification cards and an amount of United States currency * * *" from the complainant. After a bench trial, defendant was found guilty and sentenced to not less than five nor more than nine years to run concurrently with a federal sentence. The sole issue on appeal is whether defendant was proven guilty beyond a reasonable doubt.

The evidence showed that at about 5:30 in the morning on the day in question Otis Nevils was leaving the Hitching Post Restaurant at 87th and Stony Island Avenue in Chicago when four men approached him; one of them pointed a gun at him and forced him into his car. The men then took him into an alley and robbed him of rings, cash and a wallet and other items in the trunk of his car. Defendant was seated in the back seat with his left arm around Nevils' neck, holding a nickel plated revolver to Nevils' head with his right hand. After two of the men had driven off in another car, defendant entered the front seat and Wilder drove the car around in an alley where defendant told Nevils to lie down and pull his coat up over his head. A few minutes later Nevils flagged a passing police car and a Chicago police officer radioed



THE
LIBRARY
OF THE
UNIVERSITY OF
MICHIGAN
ANN ARBOR
MICHIGAN
U.S.A.

a description of the suspects and of Nevils' car, a 1970 gold Cadillac with Wisconsin license plates. About five minutes later, at 69th and South Chicago Avenue, other Chicago policemen, responding to the radio call, spotted the defendant driving the 1970 gold Cadillac and pulled him over. Nevils arrived and identified Wilder and defendant and his 1970 gold Cadillac.

The defendants' version was that Nevils had sold them three worthless rings for \$700 about four months earlier and that they met him at a night club at 55th and State Street and were trying to persuade Nevils to refund their money. According to their story, Nevils, defendant and Wilder got in the car and drove to the Hitching Post Restaurant at 87th and Stony Island Avenue in Chicago where Nevils left the car and went into a restaurant to make a telephone call. Wilder testified they told Nevils they were "going to hold the car" and drove away. Defendant testified that when he saw Nevils talking to a man at the Hitching Post at 87th and Stony Island, he thought Nevils was going to "maybe pull a gun and take, you know, threaten us to make us get out of his car with some help."

It is the province of the trier of fact to determine the credibility of witnesses, and a reviewing court will not reverse unless the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt. People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96. The complainant here told a coherent and believable story. He fully and adequately explained some seeming discrepancies in his story, despite vigorous cross-examination. Under the circumstances the trial court was not obliged to accept defendants' version of the events.

Since we conclude that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt, the judgment of the circuit court is affirmed.

AFFIRMED.

Abstract only.

12/24/11

Dear Mr. [Name],
I am writing to you regarding the [Topic].
I have received your letter of [Date] and am pleased to hear from you.
The information you provided is being reviewed and we will get back to you as soon as possible.
Thank you for your patience.

Sincerely,
[Signature]
[Name]
[Title]
[Company Name]

Enclosed for you are [Number] copies of [Document Name].
If you have any questions, please do not hesitate to contact me at [Phone Number] or [Email Address].
Best regards,

[Signature]
[Name]
[Title]
[Company Name]

cc: [List of names]
[Additional notes or footer text]



11 I.A.³ 641

56991

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
ELLIS M. HENDERSON,	)	Hon. Robert J. Downing,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Ellis M. Henderson (defendant) was found guilty by a jury of armed robbery, in violation of section 18-2 of the Criminal Code. He was sentenced to three to nine years in the penitentiary. (Ill.Rev.Stat. 1969, ch.38, par.18-2.) He appeals.

The public defender of Cook County, appointed as defendant's counsel on appeal, has filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738, in which he alleges that the appeal is frivolous and could not be successful. Copies of the brief and motion were sent to defendant and he was allowed an additional 70 days within which to file any points he desired to support the appeal. Defendant has filed no response.

At a hearing on defendant's motion to suppress identification testimony, the complaining witness testified that he had arrived at his Forest Park (Illinois) apartment about 10:30 p. m. on April 3, 1970, and was waiting for the elevator to take him to his floor when the defendant approached him with a gun and took his money, wristwatch and credit cards. The area where the robbery occurred was well lighted, the



Very faint, illegible text lines, possibly a header or introductory paragraph.

Very faint, illegible text lines, possibly a paragraph or list item.

Very faint, illegible text lines, possibly a paragraph or list item.

Very faint, illegible text lines, possibly a paragraph or list item.

defendant stood within arm's length of the witness, the witness could see everything "very well", and the defendant wore no mask. The robbery was reported to the Forest Park police and a description of the offender was given. Shortly thereafter, the Forest Park police notified the witness that the Schiller Park (Illinois) police were holding a man whom they wanted him to view. The witness was transported to the Schiller Park police station where, immediately upon entering the station, he identified the defendant, who was seated with another man on a couch, as his assailant.

A Schiller Park police officer testified at the hearing that he stopped a vehicle being driven by defendant for a traffic violation at about 11:30 that night; and, when the defendant was unable to produce identification, the officer placed him under arrest. At the time of the arrest, the officer knew of the "incident" in Forest Park, he had a description of the assailant and the defendant matched that description. The officer also determined that the vehicle being driven by the defendant was stolen. The officer further testified that when the defendant and his companion, who was also in the vehicle, were seen by the complaining witness at the Schiller Park police station about an hour later, the defendant and his companion were the only two male Negroes in the station.

A Forest Park police officer testified at the hearing that he transported the complaining witness to the Schiller Park police station where the complaining witness identified the defendant as his assailant immediately upon entering the station.

The motion to suppress the identification testimony was denied. Also a motion to quash the arrest and suppress evidence

was denied by another judge at a hearing held in connection with an unrelated charge but involving the same arrest in Schiller Park. The proceedings are reflected in People v. Henderson, General No. 55844, pending in this court. We find no significant difference between the testimony given at this hearing and that heard in the case at bar.

The three witnesses who testified at the hearing on the motion to suppress also testified in essentially the same manner at the trial of the case. Defendant, who absolutely refused to cooperate with his counsel (his third appointed "bar association" lawyer), did not testify in his own behalf. From the time of his arraignment in this matter until and including the time of trial, defendant filed numerous motions for continuances, new counsel, substitution of judges, and the like, which considerably delayed the trial thereof.

The sole point raised by the public defender in his Anders brief relates to the legality of the defendant's arrest and search. That matter, the record discloses, was determined by another judge; nevertheless, the record further reveals that the arresting officer had ample grounds upon which to effect the defendant's arrest. That point is frivolous and will not support an appeal in this case.

We further take note of the five points raised in defendant's pro se post trial motion. In that regard, defendant's demand for a jury of his peers appears to have been based upon the fact that the jury before which he was tried was not made up entirely of Negroes. He was clearly not entitled to a jury of such makeup. As to having been denied counsel of his own choice, defendant initially demanded, and was given, counsel

1870
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1870.

1871
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1871.

1872
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1872.

1873
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1873.

1874
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1874.

1875
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1875.

1876
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1876.

1877
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1877.

1878
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1878.

1879
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1879.

1880
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1880.

1881
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1881.

1882
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1882.

1883
The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1883.

other than the public defender. Three "bar association" lawyers in succession were appointed for him. The court properly exercised its discretion in denying any further extension of time when a fourth attorney appeared on the first day of trial at the instance of defendant's brother. With regard to the claim involving the four term act, the common law record shows that numerous delays in the trial of the case were due to defendant, through his counsel and himself pro se. As to the alleged failure of the State to produce police reports and the results of certain tests, it appears that this contention is based upon defendant's continuous demand at trial that he personally be supplied with photocopies of all papers in question. These papers were never denied him and his counsel had access to them throughout the trial. The last two points, those of excessiveness of sentence and insufficiency of the evidence, are clearly frivolous in light of the record.

The sole point which may be raised upon an independent review of the record by this court, as is required under the Anders case, is whether the confrontation at the Schiller Park police station between the complaining witness and the defendant, he and his companion having been the only two male Negroes in the station at the time, was so suggestive as to have tainted the complaining witness' in-court identification of the defendant. The foregoing summary of the evidence, however, shows that the in-court identification had an independent and uninfluenced origin at the time of the robbery. The complaining witness then had ample time and opportunity to view the defendant, quite independent of the station house confrontation, whether the latter be held to have been improper or not. This cannot serve as a ground to support the appeal in this matter.

After a review of the entire record in this case, we conclude that the appeal is frivolous and wholly without merit. The motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed. Judgment Affirmed.

BURKE, P.J., and EGAN, J., concur.

Abstract Only.

1880

Received of the Hon. Secy. of the Navy
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of

1881

Received of the Hon. Secy. of the Navy
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of
the sum of \$100.00 for the purchase of



11 I.A.³ 642

AB8T

57500

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
ELIJAH DANIELS,	)	Hon. James M. Bailey,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Elijah Daniels (defendant) was convicted of attempt robbery. (Ill.Rev.Stat. 1969, ch.38, par.8-4(c)(2).) He was sentenced to not less than one nor more than ten years in the Illinois State Penitentiary. The single issue on his appeal is whether the maximum sentence imposed should be reduced.

Allen Hayes testified that, on February 3, 1971, he was working as an attendant at a Clark Gasoline Station at 7832 South Chicago Avenue, in Chicago. At approximately 8:00 p. m., defendant, whom he identified in court, asked to use the telephone and he said: "Use the one outside, you can't use this one in here." Defendant left and walked over to the cigarette box, then he turned around and came back. When the witness opened the door, the defendant stepped inside and said, "Stick up." Defendant held the gun at the forehead of the witness who knocked the gun out of defendant's hand and knocked him down. Another person had accompanied defendant. Defendant shouted, "Shoot him"; but the accomplice ran away. A policeman came and took the defendant away.

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

1000 1000 1000

This testimony was corroborated in substance by the owner of the gas station, John A. Thomas, who was present, and by Officer Dixon, who arrived on the scene just as the defendant drew his gun and pointed it at the complainant.

Defendant's version of the affair was that he and a friend went to the station to use the telephone. His friend had a gun, but he didn't know it. Hayes would not let them use the phone, and his friend said, "What you mean, we can't use the phone?" and "The next thing I know Allen Hayes pushed me into him and the next thing I know I heard a gun fall to the floor, and the next thing I know he pulled a gun out of his pocket and told me to freeze." When he was arrested, defendant told the police he was sixteen years old, but he was actually eighteen years old, and gave them an incorrect name, that of "Michael Tarlton." He also gave the police a home address that was not his, and did not tell them the identity of his companion until a later date.

In aggravation, the State said defendant had been fined for gambling, \$25, and recommended a sentence of five to ten years in the Illinois State Penitentiary. In mitigation, it was shown that the defendant, eighteen years old, was engaged to be married and his fiancée was present in court along with his father, that he was a graduate of Englewood High School and lives with his parents. Defendant stated he worked in a body shop for about eight months before his arrest.

In passing sentence, the court had the following to say:

"You had a loaded weapon, somebody could have died. Mr. Thomas or the other gentleman, Mr. Hayes. I can't see where I can really have any great heartbreak for this young man. At the same time, I don't

the first of these is the fact that the
 second of these is the fact that the
 third of these is the fact that the

the first of these is the fact that the

the second of these is the fact that the

the third of these is the fact that the

the fourth of these is the fact that the

the fifth of these is the fact that the

the sixth of these is the fact that the

the seventh of these is the fact that the

the eighth of these is the fact that the

the ninth of these is the fact that the

the tenth of these is the fact that the

the eleventh of these is the fact that the

the twelfth of these is the fact that the

the thirteenth of these is the fact that the

the fourteenth of these is the fact that the

the fifteenth of these is the fact that the

the sixteenth of these is the fact that the

the seventeenth of these is the fact that the

the eighteenth of these is the fact that the

the nineteenth of these is the fact that the

the twentieth of these is the fact that the

the twenty-first of these is the fact that the

the twenty-second of these is the fact that the

the twenty-third of these is the fact that the

the twenty-fourth of these is the fact that the

the twenty-fifth of these is the fact that the

the twenty-sixth of these is the fact that the

the twenty-seventh of these is the fact that the

want to go ahead and shut out any future he might have for rehabilitation. As far as I am concerned he is still a young man, he has a long life ahead of him.

"The sentence of the court will be a minimum of two to a maximum of ten years. He has the keys in his pocket as to when he wants to get out of the penitentiary. I hope when he is out there he will take advantage of the educational programs."

The court later reduced the minimum sentence to one year.

The sentence here is well within the statutory maximum of 14 years. As the Supreme Court stated in People v. Fox (1972), 48 Ill.2d 239, 251-252, 269 N.E.2d 720:

"The trial court is normally in a superior position during the trial and the hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review."

Defendant's reasoning begins with statements by the court which cite with approval one of the standards of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, suggesting that "to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one third of the maximum sentence actually imposed"; People v. Jones (1968), 92 Ill.App.2d 124, 128-129, 235 N.E.2d 379. Defendant therefore argues that the converse is true, that is, that it follows that the maximum sentence "should be approximately three times the minimum." This does not follow, in that the principle of indeterminacy is fully maintained no matter how extended the maximum might be. The logic in the cited cases applies only to minimum sentences.



While it is clear that under Supreme Court Rule 615 (50 Ill.2d Rule 615), the court has power to reduce the sentence, we feel that the sentence in this case should not be reduced.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.

Abstract Only.





11 I.A.³ 648
9/27/73

NO. 57194

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. FENTON DELLAHOUSAYE,)
)
Petitioner-Appellant,)
)
vs.)
)
JOHN J. TWOMEY, Warden,)
)
Respondent-Appellee.)

ABST
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JOSEPH A. POWER,
PRESIDING.

PER CURIAM (Second Division, First District):

The defendant was originally charged by nine separate indictments with eight armed robberies and one unlawful possession of a narcotic drug. On January 25, 1966, upon his plea of guilty, he was sentenced to concurrent terms of two to ten years in the Illinois State Penitentiary on each charge. On June 7, 1968, the defendant was paroled. On August 9, 1971, he was declared to be a parole violator. On June 16, 1971, the defendant filed an application for a writ of habeas corpus, attacking his 1966 convictions and the revocation of his parole. Thereafter, the defendant filed three more applications for a writ of habeas corpus, again attacking his 1966 convictions and the revocation of his parole. The public defender was appointed to represent the defendant. On December 8, 1971, upon a State's motion, the trial court dismissed the defendant's four petitions for a writ of habeas corpus.

The defendant wished to appeal the dismissal of his four habeas corpus petitions and the Illinois Defender Project was appointed to represent him, but after examining the case, the Illinois Defender Project filed a petition in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. That brief states, in effect, that an appeal in this case would be wholly frivolous. This court notified the defendant of the pending petition and



granted him leave to file additional arguments. The defendant has replied.

The petition and brief of the Illinois Defender Project alleged that the only available ground for relief under our habeas corpus statute is where the judgment was entered by a trial court which lacked jurisdiction or where something has happened since the defendant's detention that would entitle him to relief. In his four habeas corpus petitions and in his reply to this court, the defendant has asserted 19 contentions for reversal. These contentions can be grouped into two categories: first, those which concern trial errors and second, those which concern illegal incarceration due to procedures surrounding the revocation of his parole.

Our review of the case discloses that the trial court did not err in dismissing defendant's petition. None of defendant's contentions reveal that the trial court lacked jurisdiction. Habeas corpus is not available to review errors of a non-jurisdictional nature. People ex rel. Skinner v. Randolph, 35 Ill. 2d 589, 221 N.E. 2d 279; People ex rel. Rose v. Randolph, 33 Ill. 2d 453, 211 N.E. 2d 685. The defendant's original convictions in 1966 were entered by a court with jurisdiction over the subject matter and the defendant, and nothing has happened since their rendition to entitle defendant to release. People ex rel. Jefferson v. Brantley, 44 Ill. 2d 31, 253 N.E. 2d 378.

Our examination of the record, as required by Anders, reveals no additional possible ground for appeal and we have concluded that the appeal is frivolous and without merit. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel for defendant on appeal and the judgment of conviction is affirmed.

Petition allowed;
Judgment affirmed.

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..



11 I.A.³ 649

ABST

57336

PEOPLE OF THE STATE OF ILLINOIS)	
ex rel STEPHEN A. JOHNSON,)	
)	
Petitioner-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
RICHARD J. ELROD, SHERIFF OF	)	HONORABLE JOSEPH A. POWER,
COOK COUNTY, ILLINOIS,	)	Presiding.
)	
Respondent-Appellee.))	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Stephen A. Johnson (petitioner) appeals from the dismissal of his Petition for Writ of Habeas Corpus by the Circuit Court of Cook County.

The Illinois Defender Project was appointed as petitioner's counsel on appeal and has filed a motion for leave to withdraw as appellate counsel, supported by a brief filed pursuant to Anders v. California, 386 U.S. 738, wherein counsel contends that the appeal is frivolous and without merit. Copies of the motion and brief were sent to petitioner and he was allowed additional time to file any points he desired in support of the appeal; petitioner has not responded.

On June 26, 1970, petitioner was found guilty in the State of Indiana on a charge of armed robbery and was sentenced to a term of 10 to 20 years in the Indiana State Reformatory. While serving that term he was extradited by executive order to the State of Illinois and was incarcerated in the Cook County Jail pending trial on an Illinois criminal charge.

The Petition for Writ of Habeas Corpus was filed on September 22, 1971, alleging in essence that the State of Indiana had lost jurisdiction over petitioner by the act of extradition, alleging that petitioner was allowed no hearing prior to extradition as required by the Uniform Extradition Act (Ill. Rev. Stat. 1971, ch.



THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
SMITHSONIAN INSTITUTION
WASHINGTON, D. C.

1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025

60, par. 18, et seq.), and requesting that he be discharged from Illinois custody. The respondent filed a motion to dismiss the Petition on the grounds that petitioner was extradited from Indiana by executive order to stand trial in Illinois on a criminal charge. The Petition was dismissed on November 24, 1971, and this appeal followed.

We agree with appellate counsel that whether the State of Indiana has lost jurisdiction over petitioner is properly one for the Indiana authorities to determine. Extradition of a person in custody of a sister state for trial on charges in the demanding state has been upheld in Illinois. People ex rel Fleming v. Pate, 48 Ill.2d 426, 270 N.E.2d 4. Further, the failure of the sending state to hold a hearing prior to the extradition does not constitute grounds for discharge or a loss of jurisdiction. People ex rel Lehman v. Frye, 35 Ill.2d 343, 220 N.E.2d 235. Finally, even if petitioner was brought by improper means before the Illinois court for trial on criminal charges, such would not impair the court's jurisdiction to try him. People v. Pardo, 47 Ill.2d 420, 265 N.E.2d 656.

No other grounds are presented in the Petition which would entitle petitioner to discharge (Ill. Rev. Stat. 1971, ch. 65, par. 22) and, upon independent review of the record in pursuance of our duties under the Anders decision, this court had found no other grounds upon which an appeal in this case could be based. The appeal is frivolous and wholly without merit.

For these reasons, the motion of the Illinois Defender Project for leave to withdraw as appellate counsel is allowed and the judgment of the Circuit Court of Cook County is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.



NO. 58029



11 I.A.³ 650

ABST

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
ROBERT JOHNSON,	)	HONORABLE
	)	PHILIP ROMITI,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (Second Division, First District):

Robert Johnson, hereafter called petitioner, appeals from an order denying his amended petition filed pursuant to the Post Conviction Hearing Act. Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq. In his amended post-conviction petition and in this court, petitioner argues that his constitutional rights were violated by the admission into evidence at his trial of his in-court identification by a prosecution witness when that identification was tainted by illegal pre-indictment identification and was made in the absence of counsel.

On January 16, 1969, after a jury trial, the petitioner was convicted of deviate sexual assault. He was sentenced to serve a term of six to ten years in the Illinois State Penitentiary. He appealed. On March 24, 1971, we affirmed his conviction. People v. Johnson, 132 Ill. App. 2d 669, 270 N.E. 2d 176. On November 18, 1970, petitioner filed a pro se post-conviction petition. An attorney was appointed to represent him and an amended post-conviction petition was denied without an evidentiary hearing.

A proceeding under the Post Conviction Hearing Act is a new proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. People v. Beckham, 46 Ill. 2d 569, 264 N.E. 2d 149; People v. Derengowski, 44 Ill. 2d 476, 256 N.E. 2d 455. Where an allegation has previously been considered and rejected by this court, any reconsideration of the same allegation in a



post-conviction proceeding is barred by the doctrine of res judicata. People v. Walker, 6 Ill. App. 3d 909, 286 N.E. 2d 812; People v. Westbrook, 5 Ill. App. 3d 970, 284 N.E. 2d 695. The concept of res judicata includes all issues actually presented and those which could have been presented, but were not. People v. Bracey, 8 Ill. App. 3d 119, 289 N.E. 2d 241. It is a settled rule that when a conviction has been reviewed, any claim which could have been raised, but was not, is considered waived. People v. Ashley, 34 Ill. 2d 402, 216 N.E. 2d 126; People v. Jones, 5 Ill. App. 3d 951, 284 N.E. 2d 418. This rule will be relaxed only where fundamental fairness requires it. People v. Mamolella, 42 Ill. 2d 69, 245 N.E. 2d 485.

In the case at bar, we find no fundamental unfairness. Petitioner originally appealed his conviction to this court and we affirmed (132 Ill. App. 2d 669). There, petitioner argued that his identification was tenuous and insufficient to support his conviction. We rejected this argument, holding that the identification testimony was "positive and unshaken" and based upon an "ample time and opportunity to view the assailants." Since petitioner has once had a review of this question he cannot seek a reconsideration through the Post Conviction Hearing Act. Further, we note that there was independent basis for the in-court identification. People v. Fox, 48 Ill. 2d 239, 269 N.E. 2d 720.

Petitioner, in his direct appeal, could have raised the issue of lack of counsel at the pre-indictment identification. Having once had a review of his conviction and having failed to present this issue for review, the question is now not open to post-conviction attack. The petitioner argues that res judicata should not be applied to his argument that counsel was required at the pre-indictment lineup because the trial record did not



show a lack of counsel. Even if we were to consider this issue on its merits, we have recently held that, based upon Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877, the failure to provide a defendant with counsel at a pre-indictment lineup is not error which in any way affects the conviction. People v. Marshall, ____ Ill. App. 3d ____, ____ N.E. 2d ____ (Nos. 55604, 55731, decided January 30, 1973).

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Publish abstract only.





11 I.A.³ 704
AB3T

58012

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
CHARLES EVANS,	)	HONORABLE
	)	NATHAN COHEN,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Charles Evans (petitioner) appealed to the Illinois Supreme Court from the dismissal, without an evidentiary hearing, of his amended petition filed pursuant to the Illinois Post Conviction Hearing Act. Ill. Rev. Stat. 1967, ch. 38, par. 122-1, et seq. The appeal was transferred to this court.

Petitioner contends on this appeal that his petition should not have been summarily dismissed without an evidentiary hearing in that substantial violations of constitutional rights were alleged therein and the allegations were sufficiently supported by the facts. Petitioner also questions, but without designating it under separate issue, the competency of his post-conviction counsel and the advisability of the appointment of the public defender as such counsel since petitioner was represented by the public defender at the trial of the cause.

Petitioner was indicted with John D. Harper for two offenses of burglary (of a school and a convent) and one offense of aggravated battery (of a nun) in violation of Sections 19-1 and 12-4(a), respectively, of the Criminal Code, the said offenses occurring in March 1965. Ill. Rev. Stat. 1963, ch. 38, pars. 19-1, 12-4(a). They were tried jointly and both men were found guilty by a jury as charged in the three indictments. Petitioner was sentenced to terms of 30 to 60 years on each of the burglary convictions and seven to 15 years on the aggravated battery conviction, the terms to run consecutively. Harper was sentenced to



seven to 15 years on each of the burglary convictions and to five to 10 years on the aggravated battery conviction, the terms to run concurrently. Petitioner and Harper appealed jointly to this court from those judgments. People v. Harper, 91 Ill. App. 2d 179, 234 N.E.2d 171 (January 1968). This court reversed the judgments as to Harper and remanded the causes for a new trial as to him on the grounds that it was error to deny his motion for a severance. As to petitioner, this court reduced the sentences imposed for the burglaries to seven to 15 years for each burglary, to run concurrently, and, as so modified, the judgments were affirmed.

In June 1968 petitioner filed a pro se petition pursuant to the Post Conviction Hearing Act in which he alleged that he confessed to the offenses charged in the indictments after he was coerced, drugged and beaten by the police, and that he was not warned of his right to remain silent, his right to counsel and that anything he said might be used against him, all in violation of his constitutional rights. The petition recited general propositions of abstract law from various constitutional amendments and argued the alleged violation of petitioner's constitutional rights. The petition further recited that a motion was made to suppress his confession, which motion was denied. No affidavits were filed in support of the petition as required by the Act. Ill. Rev. Stat. 1967, ch. 38, par. 122-2.

The State filed a motion to dismiss the petition on the grounds that no constitutional issue was raised; that the petition alleged only bare, unsupported allegations; that a hearing was had on the motion to suppress the confession, thereby barring a reconsideration thereof on the grounds of res judicata; and that the warning requirements set out in the case of Miranda v. Arizona, 384 U.S. 436, post-dated the time when petitioner alleged that he was not given warnings.

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place. The author also discusses the theory of evolution, and shows that it is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place.

The second part of the paper is devoted to a discussion of the problem of the origin of the human race. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human race, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place. The author also discusses the theory of evolution, and shows that it is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place.

The third part of the paper is devoted to a discussion of the problem of the origin of the human mind. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human mind, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place. The author also discusses the theory of evolution, and shows that it is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place.

The fourth part of the paper is devoted to a discussion of the problem of the origin of the human soul. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human soul, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place. The author also discusses the theory of evolution, and shows that it is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place.

In January 1969 an amended post-conviction petition was filed on petitioner's behalf by the public defender of Cook County who was appointed as petitioner's counsel in the post-conviction proceedings. The amended petition alleged that petitioner's trial counsel (two) were incompetent and ineffectual in that they did not fully investigate the indictments, as evidenced by petitioner's motion for a change of counsel at trial, which was denied; that petitioner was not advised of his rights to counsel and to remain silent, and was beaten and coerced into confessing; that one Mose Hubbard had been arrested in connection with the instant offenses but that when petitioner confessed, Hubbard was released from custody and the police investigation centered around petitioner; and that all three indictments were joined and petitioner was forced to go to trial on all at once. Again, no affidavits were filed in support of the amended petition.

The State filed a motion to dismiss the amended petition, alleging again that no constitutional issues were raised thereby; that the allegations were again bare allegations, unsupported by any allegations of specific facts; that all matters raised therein were barred by the doctrine of res judicata in light of the direct appeal from the judgments of conviction; that, as to the question of incompetency of counsel, the allegation was non-factual, non-specific and was barred by res judicata; that, with respect to the warnings and confession allegation, petitioner's arrest and confession pre-dated the Miranda case, and the motion to suppress the confession was denied; that, as to the Mose Hubbard allegation, petitioner has no constitutional right to have the police investigate anyone else; and that, with regard to the allegation relating to the three indictments being tried together, such was a matter of procedure, was not objected to below and was barred by the doctrine of res judicata.

At the hearing on the State's motion to dismiss the amended petition, the assistant public defender, a man other than the assistant who drew the amended petition, initially indicated to the court (the same judge who presided over the trial) that he was unable to secure a copy of the transcript of proceedings of the trial; counsel further was not certain whether there was a co-defendant at the trial. The court displayed initial uncertainty as to the disposition of the direct appeal by this court and as to the name of one of the attorneys representing petitioner at trial. After stating that he remembered the case, the court commented that petitioner was the "one who struck the man over the head." The court then stated that he had forgotten "who Hubbard was supposed to be," and after stating that he had the petition, the court's recollection was refreshed on the matter of the alleged incompetency of counsel and the Hubbard matter, the court noting that petitioner asked for other counsel on the morning of the trial, which the court denied. The court concluded the hearing by stating that he received a letter from the petitioner, that one of the nuns identified him unequivocally, and that the petition raised nothing that was not ruled upon on the direct appeal. The petition was accordingly dismissed. The assistant public defender representing petitioner at the hearing made no argument in support of the petition.

The amended petition on its face shows that the assistant public defender conferred with the petitioner and read the trial transcript since two additional points were raised in the amended petition which were not raised in the pro se petition and which could have come only from the petitioner's knowledge. The hearing on the petition was had before the same judge who presided over the trial and, after matters were brought to his attention which refreshed his recollection, he stated that he remembered

the case. The judge also recalled that the petitioner had made a motion for a change of trial counsel on the morning of the trial, which the judge had denied, the denial of the motion evidencing that petitioner's trial counsel were competent, contrary to his assertion in his petitions below.

It appears that all the matters raised in the post-conviction petitions either were or could have been raised on the direct appeal from the judgments of conviction and hence are barred by the doctrine of res judicata. People v. Kamsler, 39 Ill.2d 73, 233 N.E.2d 415.

The question of the court's having appointed the public defender as post-conviction counsel, where the public defender was also appointed as trial counsel and where the competency of the trial counsel is called into question, is obviated by the fact that the matter of the competency of trial counsel could have been raised on the direct appeal which was handled by counsel (three of them) other than the public defender. For that reason the cases cited by petitioner in which no direct appeal was taken are not in point: People v. Smith, 37 Ill.2d 622, 230 N.E.2d 169; People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386.

Petitioner's attack on the competency of his post-conviction counsel is also meritless. It is clear that the counsel fully abided by the views set forth in People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, in that the record here discloses that the public defender read the trial record, conferred with petitioner, and amended and presented to the court the post-conviction petition. People v. Jones, 43 Ill.2d 160, 251 N.E.2d 218, cited by defendant, where counsel failed to confer with the petitioner prior to the post-conviction hearing, is therefore not in point.

With regard to the argument raised by petitioner on appeal, that the doctrine of res judicata should not be invoked auto-

matically on appeal, the case of People v. Thomas, 38 Ill.2d 321, 231 N.E.2d 436, involves a question of whether res judicata will be applied where there had been a direct appeal whereas the petition raised a constitutional question dehors the record. Further, no such "peculiar circumstances" giving rise to a deprivation of fundamental fairness appear to exist in this case as did exist in the case of People v. Hamby, 32 Ill.2d 291, 205 N.E.2d 456, where the petitioner was at odds with his counsel on the direct appeal as to what to include as issues on that appeal.

Finally, the statement made by petitioner at pages 7 and 8 of his brief that the drawer of the amended post-conviction petition refused to include in the petition a certain portion of the trial transcript although asked to do so by petitioner finds no support in the record. Furthermore, as noted above, no affidavits were filed in support of either the pro se or the amended petition (although they were sworn to by petitioner) which state any facts apart from the facts stated in the petitions themselves.

The judgment of the circuit court allowing the People's motion and dismissing the post-conviction petition is affirmed.

AFFIRMED.

Abstract only.

4-14-12
20 min.
5th Div

11 I.A.³ 705



55464

THOMAS PAVLIK and MARGARET)	
PAVLIK,)	
)	
Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
BONIFIELD BROTHERS TRUCK LINES,)	
INC., a Corporation, and	)	Hon. James J. Mejda,
JOSEPH THOMAS,	)	Presiding.
)	
Defendants-Appellees.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

On December 5, 1962, Thomas Pavlik (plaintiff) was driving his automobile north on Western Avenue in Chicago. His wife, Margaret Pavlik, was in the right front seat. When plaintiff came to 63rd Street, he stopped. He waited for a traffic signal to change so that he could proceed to turn left to go west on 63rd Street. His car was struck in the rear by a semitrailer truck owned by Bonifield Brothers Truck Lines, Inc. (defendant.) Plaintiff and his wife filed suit against defendant and the driver of its vehicle.

The driver of the truck died prior to trial and was dismissed. Upon trial of the case, at the close of all the evidence, the trial court directed a verdict as to liability only against defendant. The jury returned a verdict finding no damages. After judgment on the verdict, post-trial motions by plaintiff and his wife were denied. Plaintiff and his wife both appealed. This court granted the motion of the wife for dismissal of her appeal. Plaintiff seeks a new trial on the issue of damages urging only that the verdict is palpably against the manifest weight of the evidence.

It is apparent at the outset that the burden rested upon plaintiff to prove injury and damages. Damages are awarded in Illinois only as compensation for harm or injury actually suffered. (Jeffrey v. Chicago Transit Authority, 37 Ill. App. 2d 327, 185 N. E. 2d 384.) In addition, plaintiff was obliged to prove that his injury was proximately caused by the negligence of defendant at the occurrence in question. (Daly v. Bant, 122 Ill. App. 2d 233, 258 N. E. 2d 382.) These principles are clearly and admirably set forth in a recent opinion of this court which, in some aspects, deals with a situation remarkably similar to the case at bar. Apato v. Be Mac Transport Co., 7 Ill. App. 3d 1099, 288 N. E. 2d 683.

Proceeding further, determination of the proximate cause of an injury is generally a question of fact to be resolved by the jury upon consideration of all the evidence. (Matteucci v. High School Dist. No. 208, 4 Ill. App. 3d 710, 715, 281 N. E. 2d 383.) Consequently, we may set aside this verdict of no damages only if it is contrary to the manifest weight of the evidence. Where the evidence regarding proximate cause is conflicting so as to present an issue of credibility for determination by the jury, we cannot substitute our own judgment for the verdict. (See Matteucci v. High School Dist. No. 208, 4 Ill. App. 3d at 714, 281 N. E. 2d 383.) In this regard, the case at bar differs from the type of cases relied upon by plaintiff in which the amount of damages awarded by the jury is questioned as being insufficient. The issue there is not proximate cause of the damages but only the adequacy of the award. See DeFreezer v. Johnson, 81 Ill. App. 2d 344, 225 N. E. 2d 46.

At the trial, plaintiff and his wife were the only occurrence witnesses and they produced two medical experts. At the time of the impact between the vehicles, plaintiff's car was standing still. There is testimony that defendant's truck was traveling one mile per hour at the time of contact. Plaintiff testified that he felt the bump, that he went forward and twisted and felt a sharp pain in the lower back. Plaintiff's car moved about two feet into the intersection but suffered no damage. A police officer arrived almost immediately. He inquired if plaintiff or his wife were injured, but plaintiff did not report injury. After the occurrence, plaintiff continued his usual work as a machinist.

Plaintiff testified that some two or three days thereafter he felt pain in his back. This condition became worse. Nine days after the accident, on December 14, 1962, he visited Dr. Manuel Daple. This doctor was not plaintiff's family physician. Dr. Daple diagnosed plaintiff's condition as a muscle spasm. He expressed the opinion that this was definitely caused by the occurrence. However, he based this view only upon statements made to him by plaintiff that his back had never previously given him any trouble. The doctor's record shows that he anticipated that plaintiff would make a complete recovery. Plaintiff made 11 visits to this doctor over a five week period. Following his first visit, plaintiff quit his part-time job working for a news agency but he continued his usual work.

In January of 1963, Dr. Daple referred plaintiff to Dr. Irwin Feinberg, an orthopedic specialist. Plaintiff complained of pain in the lower back. This doctor testified that he found no evidence of trauma but that he found a degenerative osteoarthritic condition of long duration. He also found that plaintiff

had a congenital anomaly of the lower back consisting of two fused vertebrae. The doctor testified that these conditions could have been the cause of pain without any trauma. The doctor saw plaintiff more than a dozen times and plaintiff complained of constant pain. He continued his usual work, however, during the entire year 1963. In January, 1964, plaintiff was operated on and a spinal fusion was performed in the area of the lower back. Plaintiff did not work for about ten months thereafter. Plaintiff first did well postoperatively. Some months later he complained again of pain in the lower back. In the latter part of 1966, he was hospitalized again for intensive physiotherapy. Dr. Feinberg then recommended additional surgery of an exploratory nature.

Dr. Feinberg testified that there was a causal relationship between plaintiff's problem in the low back and the accident of December 5, 1962. However, he based this opinion upon plaintiff's own statements that he had no serious back pain or back difficulty before the accident. His records show that plaintiff's pain had diminished prior to the surgery.

It is abundantly clear that plaintiff had a condition of ill-being which necessitated serious surgical and other treatment. However, it is equally clear that the evidence as to whether this condition was proximately caused by the collision is deeply conflicting. The elements which demonstrate this conflict are many: the slow speed of the truck; lack of damage to plaintiff's car; light impact evidenced by the fact that plaintiff's car was moved only two feet; plaintiff's failure to report suspected injury to the police officer; failure of plaintiff to see his own family doctor; immediate return of

plaintiff to work; lack of pain or other symptoms for several days; the congenital condition of plaintiff's back; evidence of long standing degenerative arthritic changes in plaintiff's back; diagnosis by one doctor of the condition as a muscle spasm and obvious complete reliance by both doctors upon plaintiff's own statements for their opinions of causal connection.

The combination of all of these elements is amply sufficient to support the verdict of the jury. As against this, plaintiff offered his own testimony and the opinion of two experts assailed by defendant as above noted. The opinion of an expert need not be accepted by the trier of fact, but, as with other evidence, these opinions are to be given such credence as the jury determines. Miller v. Pillsbury Co., 33 Ill. 2d 514, 518, 211 N. E. 2d 733.

We cannot agree with plaintiff's contention that the verdict is contrary to the manifest weight of the evidence.

Judgment affirmed.

BURKE, P. J., and EGAN, J., concur.



54799) Consolidated
54911)

AB3T

BETTY HORN,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
BRUCE DOUGLAS,	)	HONORABLE
	)	RAYMOND E. TRAFELET,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM (Second Division, First District):

On May 19, 1967, the plaintiff, Betty Horn, filed a complaint against the defendant, Bruce Douglas, asking for damages in the amount of \$10,000 (later raised to \$35,000) as the direct and proximate result of an accident on May 22, 1965, in which the defendant's motor vehicle collided with the vehicle in which plaintiff was riding, which at the time was stopped for traffic. At trial, a verdict was directed for the plaintiff on the issue of liability and after hearing the evidence, the jury returned a verdict of \$1,000 in her favor. She now appeals, contending that, contrary to the evidence, a verdict of \$1,000 is inadequate and that she is entitled to a new trial because reversible error was committed when the fact of compensation insurance was brought to the jury's attention through the admission in evidence of compensation insurance claims forms executed by the plaintiff (defendant's Exhibits #1, #2 and #3).

As to plaintiff's first point, we conclude that the evidence, although conflicting, supports the verdict of the jury. Defendant made it clear, from his opening argument on, that his theory of the case was that a claimed knee injury was not the result of the automobile accident and, consequently, the defendant was not liable in damages for it.

It is clear that the jury sought to compensate the plaintiff only for the injuries about which she complained at the time

54799)
54911)

of the collision and for which she sought treatment immediately after the accident. Plainly, the jury did not attempt to compensate her for the injury to her knee. In short, the jury did not accept plaintiff's claim that the knee injury was the result of the May 22, 1965, automobile accident. Its verdict finds adequate support in the record. Under these circumstances, we will not interfere.

As to plaintiff's second point, she argues that the court committed prejudicial error in admitting defendant's Exhibits #1, #2 and #3, the records of the compensation claim she filed with her employer. However, the Illinois rule is that the subject of insurance may be proper under many circumstances. Martino v. Barra, et al. (First District, Fourth Division: January 31, 1973; General No. 56371) ___ Ill.App.3d ___, ___ N.E.2d ___ (slip opinion, pages 8-9). It is our judgment that records of the plaintiff's compensation claim were properly admitted. The judgment is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY

58276

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

LOUIS STOVALL,

Defendant-Appellant:

CHICAGO BAR ASSOCIATION
11 I.A. 730
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
) ABST
)
) HON. ROBERT J. COLLINS,
) JUDGE PRESIDING.

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

Louis Stovall, the defendant, was charged by an indictment with unlawful possession of narcotic drugs in violation of section 22-3 of the Criminal Code (Ill.Rev.Stat.1969, ch. 38, par.22-3). At his arraignment on January 25, 1971, he entered a plea of not guilty and the Public Defender was appointed to represent him. When the case came on for trial on April 13, 1971, he withdrew the not guilty plea and entered a plea of guilty. After a hearing in aggravation and mitigation the court ordered that he be placed on probation for a period of five years and set as conditions of the probation that he not violate any criminal law of the State of Illinois or the ordinance of any municipality and that he enter and complete treatment in a drug abuse program.

On December 14, 1971, upon the recommendation of the probation department, an application for a warrant for probation violation was filed with the court. The basis of this application was that the defendant had failed to report to his probation officer as required and that on November 16, 1971, had been found guilty by the Circuit Court of Cook County of possessing a hypodermic needle and sentenced to 28 days in the House of Correction. The court granted the application, directed that a warrant issue and set bail at \$5000. On January 28, 1972, the recommendation of the probation officer was filed, and the court issued a rule to the defendant to show cause why probation should not be terminated.

On March 22, 1972, a hearing was had, at which the defendant was present and represented by the Public Defender. At the conclusion of the evidence the court ordered the defendant's probation revoked and sentenced him to not less than one nor more than six years in the Illinois State Penitentiary.

The defendant filed a notice of appeal on April 5, 1972, and the Public Defender was appointed as his counsel. On January 30, 1973, the Public Defender filed a motion in this court requesting leave to withdraw on the ground that an appeal would be without merit and could not possibly be successful. Pursuant to the holding in Anders v. California, 386 U.S.738, he filed a brief in support of this motion in which he stated that he had reviewed the record and had concluded that the only possible basis for an appeal would be that the defendant was denied procedural due process of law in his probation revocation hearing.

Section 117-3 of the Criminal Code (Ill.Rev.Stat.1969, ch.38,par.117-3) provides that when within the period of probation a petition charging a violation of a condition is presented the court may issue a warrant for the arrest of the probationer. The court must conduct a hearing within a reasonable time after the apprehension of the probationer, and if it determines that a condition of probation has been violated, it may alter the terms of probation or imprison the probationer. In People v. Price, 24 Ill.App.2d 364, the court, after an extensive discussion, set forth the general procedure to be followed in probation revocation hearings. The court stated that:

a defendant in every case where probation has been granted is entitled to a conscientious judicial determination according to accepted and well recognized procedural methods upon the question whether the conditions imposed upon the defendant when he was admitted to probation have been

violated. Such a defendant is entitled to know the nature of the charge in advance of any hearing wherein he is alleged to have breached the order granting him probation and must be given an opportunity to answer any charge that has been preferred against him.

24 Ill.App.2d at 376. The court also held that if the defendant is not represented at the hearing by private counsel, the Public Defender should be appointed if the defendant so desires.

In his brief the Public Defender stated it to be his conclusion that the record in the present case indicates that the defendant's hearing substantially met these requirements. After reviewing the record we agree. The defendant was present in open court and was informed of the violations with which he was charged. The Public Defender had been appointed to represent him and was familiar with the case. It was stipulated that he had been convicted of possessing a hypodermic needle during the period of probation, and there was the undisputed testimony of James Reed, the probation officer, that the defendant had committed other violations as well in that he had failed to report on schedule and had failed to enter a drug abuse program. The sentence imposed on the defendant was not in excess of that which could have been imposed originally for the offense of possession of narcotics. In view of these factors we believe that the trial court acted properly in revoking the defendant's probation and sentencing him to the penitentiary.

The Public Defender served a copy of his motion for leave to withdraw upon the defendant prior to filing it. In addition, the defendant was notified of the motion by this court in a letter dated February 13, 1973. In the same letter we gave the defendant until March 25, 1973, to file any additional information in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and that if we found that the appeal was frivolous we would grant

58276

the Public Defender's motion and affirm the court's order without further appointment of counsel.

We have made a complete examination of the proceedings and have concluded that there is no merit in this appeal. The Public Defender's request for leave to withdraw as counsel for the defendant is granted and the judgment revoking the defendant's probation and sentencing him to the penitentiary is affirmed.

AFFIRMED.

ADESKO AND DIERINGER, JJ.,

CONCUR.

(abstract only)

ABST

No. 57071

DAVID ALTMAN,)
)
Plaintiff-Appellant,)
)
vs.)
)
MAX GREGG,)
)
Defendant-Appellee.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
DAVID A. CANEL,
PRESIDING.

PER CURIAM (Fifth Division, First District):

After a bench trial, judgment for \$5000 was entered in favor of plaintiff. Plaintiff now appeals from that judgment and argues that the damages awarded are inadequate.

Evidence

Plaintiff testified that on January 21, 1968, he was a passenger in an automobile struck by an automobile driven by defendant. He was immediately taken to the hospital, x-rayed and several hours later released. One to two days later he went to see Dr. Ryan, his family physician, who gave him a short period of treatment. Thereafter he was admitted to St. Joseph's Hospital where he stayed for two weeks, incurring a bill of \$850, and then he saw Dr. Ryan for treatments three or four times a week for several months. On June 24, 1968, Dr. Ryan authorized him to return to light duty. Plaintiff's loss of wages from the date of the accident until his return to light duty was \$2300. On August 6, 1968, Dr. Ryan authorized him to return to his normal duties. Plaintiff claimed a loss of wages of \$508.80 during his period of light duty since he claimed he was not able to work at all for several weeks and that when he did work, he put in only 20 hours one week, 19 hours another week and 9 hours a third week in a work period of six weeks. He was then examined by his company physician and two days later his employment was terminated. He last saw Dr. Ryan in December, 1968. He then moved to California where he had several menial jobs for short periods of time.

Plaintiff was employed by Mystik Tape Company in 1964 as a bar lifter which required him to lift heavy bars up to shoulder height, that

he had been in an accident in 1965 which resulted in his performing light duty work until early in 1966 when he returned to bar lifting. Plaintiff testified that upon his return to work on June 24, 1968, he worked overtime as a bar lifter. Later in his testimony the plaintiff denied making this statement. He testified that he still gets extreme back pain when he does any type of physical activity. However, six months prior to trial he purchased and operated a motorcycle in California. He has received no further medical treatment for his injuries since December of 1968 when he last saw Dr. Ryan. His total doctor bill was \$1415.

Defendant testified that his automobile struck an automobile in which the plaintiff was a passenger and admitted that the accident was his fault.

Dr. Ryan testified for plaintiff that he began treating the plaintiff for back injuries in January of 1968. He noticed a spasm in the neck and lower back. He hospitalized the plaintiff for several weeks and thereafter treated him out of his office and approved the plaintiff's return for light work and later in August, 1968, his return to normal duties. Until two days prior to trial he had not seen plaintiff since December 12, 1968. His total fee was \$1415. In his examination of the plaintiff two days prior to trial he still found some limitation in the movement of the plaintiff's back. In his opinion, the lack of movement was subjective.

Dr. Nathaniel Zeitlin testified for plaintiff that he examined the plaintiff on December 31, 1970. In answer to a hypothetical question, he stated that there was a causal connection between the accident in 1968 and plaintiff's subsequent symptoms.

Dr. Leonard R. Smith testified for the defendant that he examined the plaintiff on September 17, 1971, that plaintiff complained of pain in his lower back, that plaintiff told him that the pain in his back dates back to 1965. In answer to a hypothetical question, he testified that the plaintiff's present pain was not the result of the accident in 1968.

The trial court, in a bench trial, found on the issue of liability in favor of plaintiff and entered a judgment in the amount of \$5000.

On appeal, plaintiff argues that the verdict is insufficient since it considers plaintiff's doctor bills, hospital bills and lost work up until the point he was discharged by Mystik Tape Company, but totally fails to consider plaintiff's losses of income after leaving Mystik Tape Company up until the time of trial.

Opinion

To determine whether a verdict is grossly unfair or the result of a clear oversight necessarily requires a review of all of the testimony surrounding the claimed items of damage. Haleem v. Onate (1966), 71 Ill. App.2d 457, 219 N.E.2d 94.

In the case at bar, the testimony of the plaintiff is suspect. He testified that he first returned to work in July of 1968 doing light work and working overtime at his old job as a bar lifter. Later, on cross-examination, he denied that he worked overtime at his old job. Plaintiff testified that he has continuing pain in his back. Yet, he had received no medical treatment for three years prior to trial and had recently purchased and ridden a motorcycle. The plaintiff's own doctor authorized his return to work at his old job in August, 1968. There clearly was evidence from which the trial court could have reasonably questioned plaintiff's claim of lost wages after leaving Mystic. Zielinski v. Goldblatt Bros., Inc. (1969), 110 Ill.App.2d 248, 249 N.E. 2d 245.

The fixing of damages in a personal injury case is within the province of the trier of fact. (Ward v. Chicago Transit Authority (1964), 52 Ill.App.2d 172, 201 N.E.2d 750.) Where, as in the case at bar, there is no showing that the verdict is the result of a mistake as to the law or that the evidence was improperly admitted or rejected or that an element of damages was obviously overlooked, the amount of damages will not be disturbed on review. (Giddings v. Wyman (1961), 32 Ill.App.2d 220, 177 N.E.2d 641.) In the case at bar, the plaintiff presented a

57071

hospital bill of \$850, a doctor's bill of \$1415, loss of wages of \$2300 from the date of the accident until his return to light duty and an additional \$508.80 in lost wages when he claimed he could only work part time. These amounts total \$5,073.80. There is nothing so grossly out of balance about the judgment under the particular circumstances of this case which would lead to the conclusion that the trial court abused discretion in awarding only \$5000 in damages. We find no reason to disturb the award.

The judgment of the circuit court is affirmed.

Affirmed.

ABSTRACT ONLY



56348



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM	
Plaintiff-Appellee,)		
	)	CIRCUIT COURT,	ABST
v.)		
	)	COOK COUNTY.	
HENRY VANABLE, otherwise called)		
GEORGE MATTOX,	)	HON. KENNETH R. WENDT,	
Defendant-Appellant.)	)	Presiding.	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendant was indicted on two counts charging aggravated assault in violation of Ill.Rev.Stat. 1969, ch. 38, par. 12-2 (1) and unlawful use of weapons in violation of Ill.Rev.Stat. 1969, ch. 38, par. 24-1 (a-4). After a bench trial defendant was found guilty of all the offenses and admitted to probation for four years, the first six months to be served on the work release program of the House of Correction. He appeals.

At the trial, the People called as a witness, Chicago Police Officer Daniel McGovern who testified that on February 8, 1970, at about 3:00 A.M. he and his partner, Officer Stephen Antelek, working in plain clothes and driving an unmarked police vehicle, were traveling eastbound on 63rd Street when they stopped in obedience to a traffic signal at California Avenue. An unknown male came to their car and told the officers that a male Negro with a gun in his possession had just turned the corner going north on California Avenue.

Officer McGovern testified that he and his partner turned left, proceeded north on California Avenue and saw the defendant walking north on California. At the time the officers first observed the defendant, he was halfway between the corner of 63rd Street and California Avenue and the alley immediately north thereof. Officer McGovern crossed the police car over into the

southbound lane and both officers alighted from their vehicle, displayed their police badges and announced that they were police officers. At this time Officer Antelek had his gun drawn.

Officer McGovern further testified that at this time defendant turned and pulled a gun out of his coat. Defendant pointed the gun directly at the officers for a few seconds. Both officers repeatedly told the defendant to drop his weapon. The defendant did not fire his weapon nor did the officers discharge their weapons. The defendant then threw his weapon down on the curb underneath a parked car. Defendant turned and ran about twenty-five feet north on California Avenue before he was apprehended. The defendant kicked Officer McGovern and knocked him to the ground. Finally, with the assistance of his partner, Officer Antelek, and other Chicago police officers who had come to their assistance, the defendant was handcuffed, searched, placed in a squad car and transported to the 8th District Police Station.

Officer McGovern further testified that he recovered defendant's weapon (People's Exhibit No. 1) on the curb about three feet from where the officers initially confronted the defendant. He also stated that he obtained the name Henry Vanable from a traffic citation in defendant's wallet but that as far as he knew Henry Vanable was not defendant's correct name.

On cross-examination, Officer McGovern testified that at the time the officers initially confronted defendant, there were no other persons walking on California Avenue.

The People called as a witness Officer Stephen Antelek whose testimony corroborated the testimony given by Officer McGovern. Officer Antelek stated that the officers first observed defendant

when he was about twenty-five feet from the corner of 63rd Street and California Avenue. At this time defendant was walking in a northbound direction on the west side of California Avenue. Defendant was the only person walking on California Avenue at the time. The officer further testified that during the confrontation, defendant pointed his weapon directly at the officers.

At the close of the People's case defendant's motion to suppress the physical evidence was denied. Defendant's motion for a finding of not guilty on all counts was also denied.

The defendant testified on his own behalf that he went to the Velvet Lounge at 63rd Street and California Avenue at about 11:00 P.M. on February 8, 1970 and stayed there until 2:30 A.M. He further testified that he was warned by a policeman in the Lounge that mixed dancing was not allowed when he danced with a young white lady. Defendant then "went outside to catch some air." When defendant tried to re-enter the Lounge, he stated that the policeman told him that he could not do so because he had a gun. Defendant stated that he told the policeman in the Lounge that he had a "buckle" and not a gun. Thereafter, defendant proceeded around the corner of 63rd Street and California Avenue and went north on California Avenue intending to catch a bus or a cab in order to go home. He further testified that he heard car doors slamming and a man saying "all right, get up against the wall." Defendant stated that one of the Officers asked him where the gun was and he stated he did not have a gun. Defendant then alleged that one of the Officers produced a gun and said "well it's yours now." He further testified that the Officers took about \$135.00 from him at the 8th District Police Station. He said that all of his identification carried the name of George Mattox, but that he had a traffic ticket which

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

The second part of the paper is devoted to a discussion of the various theories of the origin of life. These theories are divided into two main classes: the theory of spontaneous generation and the theory of biogenesis. The theory of spontaneous generation is the older of the two and is based on the idea that life can arise from non-life. The theory of biogenesis is the newer of the two and is based on the idea that life can only arise from pre-existing life.

The third part of the paper is devoted to a discussion of the evidence for and against the various theories of the origin of life. It is shown that the evidence for spontaneous generation is weak, while the evidence for biogenesis is strong. It is also shown that the evidence for the theory of evolution is strong, while the evidence for the theory of creation is weak.

The fourth part of the paper is devoted to a discussion of the implications of the various theories of the origin of life. It is shown that the theory of spontaneous generation implies that life is a necessary part of the universe, while the theory of biogenesis implies that life is a mere accident. It is also shown that the theory of evolution implies that life is a necessary part of the universe, while the theory of creation implies that life is a mere accident.

The fifth part of the paper is devoted to a discussion of the future of the study of the origin of life. It is shown that the study of the origin of life is a very active field of research and that many new discoveries are being made. It is also shown that the study of the origin of life is a very important field of research and that it has many practical applications.

bore the name of Henry Vanable in his wallet.

On cross-examination, defendant testified that he did not receive the ticket (People's Exhibit 3) bearing the name Vanable. Defendant, however, further stated that he had used Henry Vanable's driver's license on one occasion and had received a traffic ticket while using the license.

Defendant argues on appeal that the trial court erred in denying defendant's motion to suppress the revolver. He argues that the arresting officer did not have probable cause to arrest him and therefore the weapon which was recovered as a direct result of the alleged unlawful arrest should have been suppressed by the trial court.

Ill.Rev.Stat. 1969, ch. 38 par. 107-2(c) provides that a peace officer may arrest a person when: "He has reasonable grounds to believe that the person is committing or has committed an offense."

The evidence adduced at the trial indicates that while the officers were stopped for a traffic signal at the intersection of 63rd Street and California Avenue, an unknown citizen informer came up to their police car and spoke to the officers. The informer stated that a male Negro had just turned the corner going north on California and that he had a gun in his possession.

Defendant argues that the sole information in possession of the officers as they approached defendant was the alleged "unreliable, uncorroborated" statement of the informer and that this was not enough to establish probable cause for the arrest.

As this court stated recently in People v. Winters, 6 Ill. App.3d 112, 285 N.E.2d 223:

The first of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The weather was very hot, and the crops were much injured.

The second of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured. The weather was very cold, and the crops were much injured.

The third of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The weather was very hot, and the crops were much injured.

The fourth of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured. The weather was very cold, and the crops were much injured.

The fifth of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The weather was very hot, and the crops were much injured.

The sixth of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured. The weather was very cold, and the crops were much injured.

"The requirement of prior reliability which must be met when police act upon a 'tip' from a professional informer, does not obtain where the information leading to an arrest without a warrant is supplied by ordinary citizens. See People v. Thompson, 3 Ill.App.3d 470, 278 N.E.2d 462; People v. Glenn, 35 Ill.2d 483, 221 N.E.2d 241; In re Boykin, 39 Ill.2d 617, 237 N.E.2d 460."

There is no evidence in the record from which it could be inferred that the informer was a "special employee" of the police department or that he was a professional informer. Moreover, as the Illinois Supreme Court stated in In re Boykin, 39 Ill.2d 617, 237 N.E.2d 460:

"[T]here is a complete absence of any possible gain to the anonymous informant from furnishing false information, and the nature of the potential danger (a concealed weapon) differs from that involved in gambling and narcotics cases." (In re Boykin, 39 Ill.2d 617, 619, 237 N.E.2d 460, 461-62).

As the Illinois Supreme Court stated in People v. Watkins, 19 Ill.2d 11, 166 N.E.2d 433:

"Police officers often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals." People v. Watkins, 19 Ill.2d 11, 19, 166 N.E.2d 433, 437.

In the present case, when the officers turned the corner and proceeded north on California Avenue, both officers observed the defendant who fit the informer's description and more significantly, defendant was the only person walking on California Avenue. These circumstances served to corroborate the informer's statement. We are of the opinion the police officers had reasonable grounds upon which to arrest the defendant without a warrant, and that the defendant's weapon which was recovered as a result of the arrest was properly admitted into evidence.

Moreover, as to defendant's contention that his revolver should have been suppressed by the trial court, we are of the

opinion that this Court's pronouncement in People v. Savage, 102 Ill.App.2d 88, 243 N.E.2d 702 is dispositive of that contention. In Savage, this Court was concerned with a case involving a strikingly similar factual situation. The defendant in Savage, when he was confronted by the police, turned and ran. One of the police officers pursued the defendant and during the course of the pursuit observed Savage discard his revolver. The officer captured Savage, placed him under arrest, and then went back and picked up the gun in the gangway where Savage had thrown it.

On appeal, in response to Savage's contention that the seizure of his revolver was unlawful, this Court stated:

"Defendant Savage cannot now complain that the revolver which he abandoned in open view was taken by 'an unreasonable search and seizure'."
People v. Savage, 102 Ill.App.2d 88, 97, 243
N.E. 2d 702, 707.

Similarly in the present case defendant, having abandoned his weapon in open view of the police officers, can not now complain that the revolver was seized by means of an unreasonable search and seizure.

Defendant argues that the prosecution failed to establish the offense of aggravated assault, in that they failed to establish beyond a reasonable doubt the alleged essential elements of (1) intent and (2) reasonable apprehension of receiving a battery.

Defendant in support of his argument that "intent" is an essential element of the proof of the offense of aggravated assault relies heavily upon Daley v. Thaxton, 92 Ill.App.2d 277, 236 N.E.2d 433. The Daley case, however, is readily distinguishable and has no application to the present case.

The offense of aggravated assault is defined by Ill.Rev. Stat.1969, ch. 38 Par. 12-2(a)(1) which states: "12-2. Sec.12-2.

Aggravated Assault.] (a) A person commits an aggravated assault, when, in committing an assault, he: (1) Uses a deadly weapon;"

Ill. Rev. Stat. 1969, ch. 38 par. 12-2 defining the offense of aggravated assault must be read in conjunction with Ill.Rev.Stat. 1969, ch. 38 par. 12-1 which defines the offense of assault as follows: "12-1. Sec. 12-1 Assault.]

(a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery."

In order to ascertain the requisite mental state which must be proved by the people, the previous paragraphs defining assault and aggravated assault must be read in connection with Ill.Rev.Stat. 1969, ch. 38 par. 4-3 (b) which provides:

"4-3. Sec. 4-3. Mental State.]

(b) If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element. If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4, 4-5 or 4-6 is applicable." (Emphasis supplied)

The aforementioned statutes concerning assault (ch. 38 par. 12-1 (a)) and aggravated assault (ch. 38 par. 12-2 (a)(1)) do not specify that the mental state "intent" (ch. 38, par. 4-4) is a particular mental state applicable to the offense of aggravated assault.

From our analysis of Statutes involved, we are of the opinion that in an indictment charging an aggravated assault in violation of Ill.Rev. Stat. ch. 38 par. 12-2 (a)(1) the prosecution is not compelled to prove "intent" within the purview of Ill.Rev.Stat. 1969, ch. 38, par. 4-4. We believe in this situation, Ill.Rev.Stat. 1969 ch. 38 par.4-3(b) is applicable and the prosecution can prove any mental state defined in ch. 38,



par. 4-4 [Intent]; ch. 38 par. 4-5 [Knowledge]; or ch. 38 par. 4-6 [Recklessness]. For this reason, defendant's argument that proof of "intent" is an essential element is without merit. As we have explained "intent" is one of the elements which the prosecution can prove but it is not an "essential" element to the charged offense, the People can also proceed on the basis of "Knowledge" within the purview of ch. 38 par. 4-5 or "Recklessness" within the purview of ch. 38 par. 4-6.

Defendant's contention that the prosecution failed to establish that the conduct of the defendant placed the complaining officers in apprehension of receiving a battery is not supported by our examination of the record, and is in our opinion without merit.

Although neither officer testified specifically as to his apprehensions, the conduct of the officers clearly demonstrates that they were in apprehension of receiving a battery. Officer McGovern testified that after seeing the defendant point his revolver directly at both officers, he took out his revolver and this indicates that Officer McGovern was apprehensive of being shot by defendant. In addition, both police officers testified that they repeatedly asked the defendant to drop his weapon and this also would indicate that the officers were apprehensive of being shot by defendant. From our review of the record, the trial judge was fully warranted in concluding, as the trier of fact, that the officers were in reasonable apprehension of receiving a battery.

Defendant argues that the trial court erred in allowing into evidence testimony indicating that the defendant could be guilty of the offense of attempt murder. Defendant premises this argument on the testimony of Officer McGovern, who stated that after he recovered defendant's revolver, he found two misfired bullets

(People's Exhibits 2A & 2B) in the revolver. Defendant alleges that the admission into evidence of the testimony tending to prove the greater offense of attempt murder constitutes reversible error.

As the Supreme Court stated in People v. Allen, 17 Ill.2d 55, 160 N.E.2d 818:

"The test of admissibility of evidence is whether it fairly tends to prove the particular offense charged and any circumstances may be put in evidence which tend to make the proposition at issue either more or less probable. (People v. Jeffers, 372 Ill.590; People v. Tokoly, 313 Ill.177.)" (People v. Allen, 17 Ill.2d 55, 63, 160 N.E.2d 818, 824.)

At the trial, defendant denied that he pointed the loaded revolver at the officers and denied that it was in his possession prior to the time when Officer Antelek recovered the revolver and allegedly said to defendant "well it's yours now." Both Officers on the contrary stated that the defendant pulled the gun on them and held it pointed at them for a few seconds and then discarded the weapon and ran. The testimony of Officer McGovern was admissible as a circumstance to be considered by the court in ascertaining the credibility of the witnesses. It would indeed be doubtful that the defendant would point an unloaded revolver at the officers. Similarly the fact that the revolver was loaded, we believe, was a circumstance for the trial court to take into consideration.

Moreover, we do not agree with defendant's conclusion that the admission of the testimony concerning the misfired bullets tended to prove the greater offense of attempt murder. The record is clear that the prosecution during the course of the trial never alluded to the offense of attempt murder. In addition, Officer McGovern testified that he could not determine when the bullets had been misfired and that at the time of the confrontation between the officers and defendant, no shots were discharged. The trial judge did not appear to be influenced by the testimony concerning the misfired bullets as

evidenced by his comment: "It (the testimony pertaining to the misfired bullets) may stand for what it is worth."

When viewed in this context, we are of the opinion that even if we were to hold that the admission of the testimony concerning the misfired bullets was error, it would be a harmless error.

Defendant argues that it was error for the prosecutor on cross-examination of the defendant to elicit from the defendant testimony concerning a prior unrelated traffic offense; namely, defendant's use of Henry Vanable's driver's license in violation of Illinois Revised Statutes 1969, ch. 95 1/2 par. 6-301 (3).

The People agree that it was improper for the prosecutor to examine defendant concerning the prior traffic violation in order to impeach defendant's credibility. The People state and correctly so that this examination was improper "because the prosecution can only impeach defendant's credibility by proof of conviction for past infamous crimes" and moreover this "issue was collateral to the main issue and had little bearing on the crimes charged."

It is significant to note that during the course of the prosecutor's examination of defendant concerning the prior traffic offense, the defense counsel at no time objected to the examination. Furthermore, as the Supreme Court stated in People v. Robinson, 30 Ill.2d 437, 197 N.E.2d 45:

"Nevertheless it is clear that when the trial court is the trier of the facts every presumption will be accorded that the judge considered only admissible evidence in reaching his conclusion. (People v. Alexander, 21 Ill.2d 347; People v. Grodkiewicz, 16 Ill.2d 192; People v. Burts, 13 Ill.2d 36.)" People v. Robinson, 30 Ill.2d 437, 439, 197 N.E. 2d 45, 47.)

From our examination of the record, the trial judge did not appear to be influenced by the testimony concerning defendant's traffic violation and we are of the opinion that any error in the



56348

introduction of this evidence at most constituted harmless error.

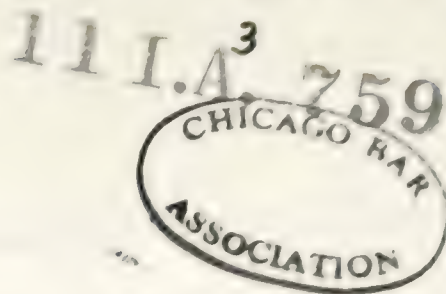
For the reasons expressed herein, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.



57003



PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM	ABST
Plaintiff-Appellee,)		
vs.)	CIRCUIT COURT,	
ELMORE BUTLER, JUNIOR,)	COOK COUNTY.	
Defendant-Appellant.)	HON. GEORGE E. DOLEZAL,	
	Presiding.	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Elmore Butler, Junior (defendant) was indicted for the offenses of indecent liberties with a child and of contributing to the sexual delinquency of a child. (Ill.Rev.Stat. 1969, ch. 38, pars.11-4(a)(3), 11-5(a)(3)). A jury found him guilty of both offenses and he was sentenced to a term of ten years to fifteen years on the indecent liberties charge. On this appeal, he contends that he was denied due process of law at his trial by reason of incompetency of his trial counsel.

The complaining witness testified that on August 31, 1970, she was ten years of age and lived in an apartment in Chicago with her mother, her eight year old brother, the defendant (who was her twenty-eight year old second cousin), the defendant's girlfriend and the girlfriend's two minor children. She testified that shortly after 8:00 A.M. on that date, while only she, the defendant and her brother (who was asleep at the time) were in the apartment and after she had received defendant's mail from defendant's mother, the defendant told her to remove her clothing, removed his clothing, laid on top of her on a hideaway bed in the living room, and "started moving his private around, tried to put his private into my private...." When the complaining witness' mother arrived home from work later that day, the witness told her of the incident with the defendant, the girl was taken to a doctor, and a physical examination revealed a half-inch tear in the girl's vaginal area; the tear was less than



[The following text is extremely faint and illegible due to the quality of the scan. It appears to be a multi-paragraph document, possibly a letter or a report, with several lines of text visible across the page.]

24 hours old at the time of the examination.

The defendant denied having improperly touched the girl, and stated that at the time of the day when the complaining witness testified he molested her he was driving his girlfriend to work some distance away from the apartment, and that he arrived home about 9:30 A.M. Defendant's mother testified that she had dropped off mail at the defendant's apartment sometime after 10:00 A.M. on that date, and that the complaining witness took the mail from her.

When defendant's girlfriend attempted to testify that defendant had driven her to work on the morning in question and that she arrived there at 8:33 A.M., an objection to the testimony was sustained on the grounds that defense counsel failed to comply with a pre-trial prosecution motion for all matters pertaining to alibi filed pursuant to section 114-14 of the Criminal Code. The jury was specifically instructed to disregard her testimony as to any association she may have had with the defendant between the hours of 7:00 and 9:00 on the morning in question.

At the close of the defendant's case, defense counsel moved for the admission into evidence of the examining doctor's report which had been originally identified as People's Exhibit #1 and which counsel wished to have marked defendant's Exhibit #1 and admitted into evidence as such. The report recited that the complaining witness had allegedly been raped by her twenty-eight year old cousin, that she was allegedly "molested" and "penetrated."

At the close of all the evidence, defense counsel argued a motion for a directed verdict out of the presence of the jury, the grounds for the motion being that the People may have proved defendant guilty of rape, but they did not prove him guilty of the crimes alleged in the indictment. In his argument to the jury, the same contention was made, that the People proved his client guilty of



rape, which he pointed out was noted on the doctor's report which was to be taken to the jury room.

Whether a defendant is deprived of due process of law because of the incompetence of his privately retained counsel is governed by a strict standard; a denial of due process occurs where he receives representation which amounts to no representation at all, or which reduces the proceedings to a farce or a sham. (People v. Redmond, 50 Ill.2d 313, 278 N.E.2d 766.) Substantial injustice must result from the manner in which trial counsel carried out his duties, without which the outcome of the proceedings would probably have been different. People v. Georgev, 38 Ill.2d 165, 169, 230 N.E.2d 851.

It is apparent from defense counsel's argument on his motion for a directed verdict that he felt that the People proved the defendant guilty of the crime of rape, but that they did not prove him guilty of the crimes of indecent liberties or contributing to the delinquency of a minor. That opinion was argued to the jury during defense counsel's argument, and the question of rape was broached to the jury by defense counsel during the trial. He also succeeded in introducing into evidence the medical report, which the People thought objectionable. Implicit in defense counsel's position in that regard is the mistaken theory that a proof of rape under the instant circumstances does not amount to a proof of indecent liberties or a proof of contributing to the sexual delinquency of a child; the act of rape under these circumstances clearly encompasses within its scope the offense of committing indecent liberties with a child. People v. Brown, 52 Ill.2d 94, 285 N.E.2d 1.

It is further noted that defendant's position at trial, as testified to by him, was that he was not in the apartment at the time the complaining witness testified that he molested her, and



that he did not in fact improperly touch the girl. This defense of alibi was totally frustrated by defense counsel's admissions, arguments and eliciting of testimony as to the rape, as well as his failure to submit to the prosecution upon its request the information relative to the alibi, pursuant to section 114-14 of the Criminal Code. As a result, defendant's girlfriend was not permitted to testify that defendant was with her at the time the molestation was alleged to have occurred.

Compounding these errors was defense counsel's inexplicable preoccupation with questions eliciting trivial details concerning the physical layout of the defendant's apartment, what the complaining witness was going to cook for her brother on the morning of the incident, and the type of gun which the complaining witness' mother testified that she withdrew from defendant's dresser upon hearing that her daughter had been molested (which weapon she immediately replaced), the weapon having nothing further to do with the matter, as well as a remark made during closing argument relative to a judge who heard criminal matters involving the defendant and who was then sitting as a federal judge.

It is true that the testimony of the complaining witness was clear and convincing and was unshaken on cross-examination; she also complained of the incident to her mother not long after she had the opportunity to speak to her and a physical examination by a doctor revealed a half-inch tear in the vaginal area of the girl. However, defense counsel's failure to properly present defendant's defense and his open admission to the jury that the People proved his client guilty of rape, which was an admission that he was proven guilty of the crimes charged in the indictment, renders it

57003

impossible to determine whether the jury decided guilt based upon the People's evidence or based upon defendant's counsel's mistakes, so that it cannot be said that without such mistakes the outcome of the trial would not have been different.

For these reasons, the judgment of the circuit court of Cook County is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

GOLDBERG and EGAN, JJ., concur.



57866



11 I.A.³ 801
ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
)	
ROBERT SMITH,	)	Hon. Robert J. Collins,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM:

Robert Smith, defendant, was convicted after a bench trial of the October 9, 1971 burglary of the apartment of Silas Jones, in violation of Ill.Rev.Stat. 1969, ch.38, par.19-1 and sentenced to the Illinois State Penitentiary for not less than two nor more than four years. The Public Defender of Cook County was appointed as defendant's counsel for the purpose of the appeal. On December 7, 1972, he filed, in this court, a motion to withdraw as counsel for appellant on the ground that there are no meritorious issues to be raised on appeal and to appeal would be wholly frivolous. A brief, as required by Anders v. California, 386 U.S. 738, accompanied the motion. Thereafter, on January 9, 1973, the court notified defendant of the pending motion and gave him until March 10, 1973, to file any additional points he might choose in support of his appeal. To date, defendant has not answered.

The Public Defender's brief in support of his motion to withdraw states that the only "bases for appeal" would be the following: (1) whether defendant was denied procedural due process by failure to give the Miranda warnings prior to all questioning; (2) whether the defendant had an equal right to the property at the time of the arrest; (3) whether the defendant was convicted of the charge of burglary beyond a reasonable doubt.

According to the testimony, Silas Jones, the complaining witness, left for vacation on October 9, 1971, about 5:15 in the morning and secured the premises. He lived in the second floor apartment of a two-flat owned by his brother, James Young, who lived on the first floor. About 8:00 that evening, James Young heard glass "crack" and went out back to investigate, saw nothing, returned to the house and heard "walking upstairs" and

had his wife call the police. Chicago Police Officer Theopsy Moore and his partner arrived in the alley behind the premises within three minutes after receiving a radio call and observed the defendant "coming out of the gate at" the premises with various articles including radios cradled in his arms. The officer announced his office, and asked the defendant where he got the articles he had in his arms. Defendant said some of the articles were his and when asked to whom the other articles belonged, defendant did not respond. The officer searched defendant, finding a cigarette lighter, screwdriver, and a transistor radio. Mr. Young appeared and saw the defendant in the police car and also saw, in the alley, some radios, which had been in his brother's apartment. One radio was light blue and had been in his brother's bedroom and the other was brown and had been in the front room. Young unlocked the front door to his brother's apartment and entered with Officer Moore, finding the back door open, the bedroom window broken and glass on the floor.

Defendant, who lived only a half block away, explained that he had been out for a walk, cut through the alley on his way home and about two-thirds of the way down the alley noticed some household goods sitting by the gangway in back of the premises. He had been there about five or six seconds wondering if people were throwing these goods away when an unmarked police car pulled up in the alley and stopped about 20 feet from him. Two officers jumped out of the car, pulled their guns, and searched him. Defendant denied that he robbed Mr. Young's premises and also denied having a conversation with Mr. Young about whether Mr. Young should prosecute him. In rebuttal, Chicago Police Officer Vega testified that defendant, while under arrest and while being processed at the station, tried to persuade Mr. Young not to sign a complaint against him. Defendant, according to the officer, asked Young if he knew a man by the name of Williams, Young had said no, and defendant then said: "Well, Williams told me to go up to the second floor where Joe lives and knock on the door because Joe is supposed to be asleep



in the second floor; and Joe didn't answer, just knock the door down, go in."

It is settled that Miranda v. Arizona does not forbid general on-the-scene questioning of the type in question here. The only question asked and answered was whether the property belonged to defendant or not. People v. Parks, 48 Ill.2d 232, 237, 269 N.E.2d 484, cert. den., 44 U.S. 1020.

Defendant's contention that he had an equal right to the property at the time of arrest and that he was not proven guilty beyond a reasonable doubt may be considered together since they depend, essentially, on whether defendant's story is to be believed. According to this story, defendant was out for a walk and happened to find the property in the alley on his way home. We agree with the Public Defender, who states in his brief, that the State presented evidence that showed the defendant guilty beyond a reasonable doubt. The complaining witness heard the burglar inside the apartment, his wife called the police, the police said they responded within three minutes. Defendant was impeached not only by his prior convictions, which the trial judge could properly have taken into account, but also by the testimony of Officer Vega that defendant had admitted being in the apartment and, while at the station house, tried to explain his presence there to the complaining witness, hoping thereby to persuade Mr. Young not to sign a complaint against him. The trial judge was not required to believe the defendant's story. People v. Harris, 131 Ill.App.2d 824, 268 N.E.2d 724.

Our examination of the record as required by Anders v. California, reveals no arguable error. We have concluded, from all the circumstances revealed by the record, that the appeal is wholly frivolous and without merit. The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for the defendant on appeal. The judgment of conviction is affirmed.

Motion granted;
Judgment affirmed.

1911
3rd Dec
10p.m.



SOUTHLAND CORPORATION, a Texas)		
corporation, and BERNARD KAREY,	)	APPEAL FROM	
Plaintiffs-Appellants,	)		ABST
	)	CIRCUIT COURT,	
v.)		
	)	COOK COUNTY.	
VILLAGE OF HOFFMAN ESTATES, a body))		
politic and corporate; FREDERICK	)	HONORABLE EDWARD J. EGAN,	
E. DOWNEY, et al.,	)	Presiding.	
Defendants-Appellees.)		

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This case first came before us as an appeal from a summary judgment granted in favor of the plaintiffs, nonresidents of the defendant village, who sued for a writ of mandamus to compel the village to permit them to utilize the village's sewer and water system. This court determined, in an opinion reported at 130 Ill. App.2d 311, 264 N.E.2d 451, that there were genuine issues as to material facts raised by the pleadings. The case was remanded to the trial court for further proceedings. Upon remand, the court considered the issues of whether the plaintiffs had standing to bring this suit and whether they properly applied for the water and sewer tap-on permits. The defendants introduced evidence that, after this action was initiated, ordinances were passed by the village to bar new permits to nonresidents. Thereafter, the petition for writ of mandamus was denied, and plaintiffs brought this appeal.

The defendants filed a motion to dismiss this appeal on the ground that the issue has become moot, and we took the motion with the case. The motion alleges that plaintiffs are now being provided with water and sewer services by the Village of Schaumburg, in which their property is located. The plaintiffs' objections to the motion to dismiss do not deny that Schaumburg is now servicing plaintiffs' property. Plaintiffs claim that the fact that they

were required to turn to Schaumburg does not render moot their claim against the defendants. The parties stated in open court that the Village of Schaumburg is providing sewer and water services to plaintiffs.

It is well-settled that the duty of our courts is confined to the adjudication of actual controversies. (Larson v. City of Loves Park, 48 Ill.App.2d 191, 198 N.E.2d 525.) Where the issues before the trial court no longer exist, the appellate court will not exercise its jurisdiction simply to ". . . decide moot or abstract questions, to establish a precedent, or to determine the right to, or liability for, costs, or, in effect, to render a judgment to guide potential future litigation." La Salle Nat. Bank v. City of Chicago, 3 Ill.2d 375, 379, 121 N.E.2d 486, 488.

The plaintiffs' action was directed at compelling the Village of Hoffman Estates to provide them with water and sewer service. The fact that such service is now being provided by another source, absent evidence that such service is of a limited duration, renders the issues in this appeal moot. Therefore the appeal is dismissed.

APPEAL DISMISSED.

BURMAN and GOLDBERG, JJ., concur.



56359 & 56360



PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
WARSTINE REESE and WILLIAM JONES,)
)
Defendants-Appellants.)

ABST
APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

HONORABLE LAWRENCE I. GENESEN,
Presiding.

PER CURIAM * (First Division, First District):

Defendants were originally charged by complaint with the offense of theft of the value of less than \$150 in violation of section 16-1(a)(1) of the Criminal Code. (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1).) After a bench trial, defendants were convicted and sentenced to five months in the House of Correction. On appeal, the only defense argument is that the failure to use the word "knowingly" in the complaint charging the defendants with theft renders the complaint fatally defective.

Since the only defense argument is that the complaint is insufficient, a detailed repetition of the facts is not necessary. The complaint alleged that the defendants had committed the offense of theft in that they "did obtain unauthorized control over property, to wit: (1) man's wallet, containing \$5 U.S. currency of the value of less than \$150, the property of, patrolman F. Stone, with the intent to deprive, said patrolman F. Stone permanently of the use and benefit of said property in violation of chapter 38, section 16-1(a)(1), Ill.Rev.Stat." In People v. Wilson, Appellate Court, First District, No. 56824, February Term, 1973, this court rejected the exact contention that the defendants now make. There, a complaint almost identical to that as in the case at bar was held sufficient.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

ABSTRACT ONLY.

* BURKE, P.J. took no part.

12/22/18

Dear Mr. [Name],

I have received your letter of the 12th inst. and am glad to hear from you. I am well and hope this finds you the same.

I am sorry to hear that you are not well. I hope you will soon be able to get on your feet again.

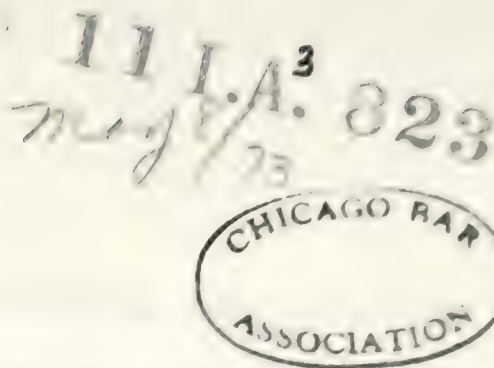
I am sure that you will be able to do so. I am sure that you will be able to do so.

I am sure that you will be able to do so. I am sure that you will be able to do so.

I am sure that you will be able to do so. I am sure that you will be able to do so.

I am sure that you will be able to do so. I am sure that you will be able to do so.

55915



PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

HAROLD BRISKER,)

Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
JAMES M. BAILEY,
PRESIDING.

ABST

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Defendant was found guilty of robbery after a jury trial and was sentenced to a term of 5 to 15 years in the Illinois State Penitentiary. On appeal, defendant argues that he was denied a fair trial (1) by the State's improper cross-examination of a defense witness; (2) because he was represented by ineffective counsel; and (3) by the closing argument of the prosecution.

Since defendant does not challenge the sufficiency of the evidence, a detailed review of the evidence is not required. Briefly summarized, the evidence established that on October 2, 1970, at approximately 3:25 A.M., Mr. Alex White was changing subway trains at the Jackson Street Terminal, Chicago, Illinois. A man came up behind him, put his arm around Mr. White's neck, and demanded money. The man took between four and five dollars in change from Mr. White's pocket and then fled. Mr. White pursued the man and fired a gun, which he had in his possession, toward the pavement. A Chicago Police Officer heard the shot and proceeded in that direction. He observed defendant come into view with Mr. White in pursuit. Defendant was placed under arrest and a search of his person revealed \$5.31 in change.

Defendant's first argument is that the State's cross-examination of George Coles, a defense witness, constituted reversible error. Mr. Coles testified that defendant had come to his apartment on October 1st. During cross-examination, the State asked how the witness remembered that particular date. The witness

1894



1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

1894

answered that he remembered because defendant had been locked up and had just gotten out of jail the day before. The question and answer were not objected to by the defense. Defendant now argues that this question and answer constituted improper cross-examination requiring a reversal.

The question asked by the Assistant State's Attorney was a proper question, although the answer may have been improper. The testimony as to defendant's recent release from jail was not adduced by the deliberate actions of the State. In view of the fact that the defense at trial did not object to the question and also of the fact that the testimony was not adduced by deliberate actions of the State, we are of the opinion that defendant was not denied a fair trial. People v. Naujokas, 25 Ill.2d 32, 182 N.E. 2d 700; People v. Trefonas, 9 Ill.2d 92, 136 N.E.2d 817. We also note that defense counsel on voir dire had already asked several prospective jurors whether they would be prejudiced against defendant because he had been convicted of a previous burglary.

Defendant also cites as being improper a second question asked of Mr. Coles as to whether he had ever visited defendant in Cook County Jail. This question, which was not objected to, was in no way connected to the earlier questioning of the witness, and was asked to ascertain whether the witness had ever talked to the defendant about his testimony in the instant case, after the witness had stated that he had not. The question was proper. We see nothing prejudicial in having the jury learn the mere fact that defendant had been in custody pending the instant trial.

Defendant's second argument is that he was represented by ineffective counsel. Defendant bases this argument on the fact that (1) during the voir dire jury examination, his attorney inquired of several prospective jurors as to whether they would be prejudiced against the defendant because he had been convicted of a previous burglary; (2) that counsel did not object to the cross-

examination of George Coles; and (3) that counsel did not object to the State's closing argument.

To warrant a reversal because of the incompetence of court-appointed counsel, it must clearly appear, not only that counsel performed his trial duties in an incompetent manner, but also that defendant was prejudiced thereby. People v. Bernatowicz, 35 Ill.2d 192, 220 N.E.2d 745. In the case at bar, the fact that defense attorney questioned prospective jurors as to whether or not they would be prejudiced against the defendant because he had been convicted of burglary does not demonstrate incompetence. This was obviously an intentional trial tactic by counsel to demonstrate candor, since there was a possibility that defendant would testify, at which time his prior conviction of burglary, an infamous crime, could be brought out in rebuttal by the State, for the purpose of impeachment. Similarly, defense counsel's failure to object during the cross-examination of Mr. Coles and to the State's closing argument was also a matter of trial judgment. It is a well settled rule of law that appellate review of trial counsel's competence does not extend to those areas involving the exercise of judgment, discretion or trial tactics. People v. Walker, 2 Ill.App.3d 1026, 279 N.E.2d 23. In the case at bar, a complete review of the record demonstrates that defendant has failed to show incompetence of his trial counsel.

Defendant's final contention is that the State's closing argument was highly prejudicial and denied him a fair trial. During the rebuttal argument, the Assistant State's Attorney, in responding to the reasonableness of the defense attorney's argument, in one instance referred to the testimony that defendant had recently been released from jail. This argument was not dwelt upon and was but one reference in a lengthy closing argument. Further, the defense attorney did not object to the comments of the prosecutor; therefore, the point may not be raised for the first time in a court



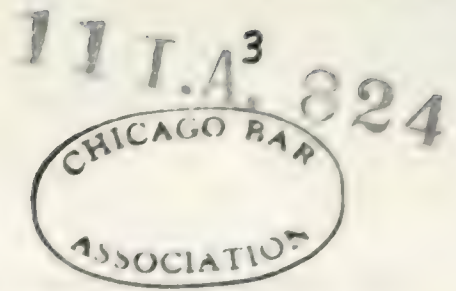
55915

of review. People v. Graham, 2 Ill.App.3d 1022, 279 N.E.2d 41. The defendant was not denied a fair trial by the State's closing argument.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.





56287

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
CHARLES ROBINSON	)	HONORABLE SAUL A. EPTON,
(Impleaded),	)	Presiding.
)	
Defendant-Appellant.))	

MR. PRESIDING JUSTICE STAMOS delivered the opinion of the court.

Defendant was convicted of murder. His sole contention on appeal is that he was deprived of due process of law by the trial court's denial of his motion for a continuance.

Defendant was indicted for the offense of murder on October 7, 1970. On October 22, 1970 defendant's attorney filed an appearance and requested a bill of particulars and a list of witnesses. On motion of the State the cause was continued until November 18, 1970 on which date defendant's motion for a continuance to December 8, 1970 was allowed. The State filed a bill of particulars, a list of forty-seven witnesses and a request for notice of an alibi defense on November 30, 1970. On December 8, 1970 the State filed an amended bill of particulars and the court granted defendant's motion for a continuance to January 13, 1971. Defendant secured two further continuances to March 9, 1971 and April 26, 1971. On the latter date defendant's attorney requested another continuance on the ground that he had not been able to confer with possible witnesses. The trial court denied the motion on the grounds that the previous continuance had been granted for the identical reason and April 26, 1971 had been set as a firm date for trial. A bench trial was then conducted resulting in defendant's conviction of murder.

Defendant contends that the denial of his request for a continuance forced him to trial unprepared thus depriving him of the right to effective assistance of counsel and due process of law.

The Illinois Code of Criminal Procedure deals comprehensively with the subject of continuances. (Ill. Rev. Stat. 1969, ch. 38, par. 114-4.) A study of Section 114-4 of the Code and the prior case law establishes that the granting of a continuance in a criminal case is dependent upon the facts and circumstances of each particular case and is a matter resting on the sound discretion of the trial court which will not be disturbed on review unless an abuse of discretion is shown. (Ill. Rev. Stat. 1969, ch. 38, par. 114-4; People v. Clark, 9 Ill.2d 46, 137 N.E.2d 54; People v. Storer, 329 Ill. 536, 161 N.E. 76.) The Committee Comments to Section 114-4 reflect that it was not intended to establish a stall-device for either party and it was hoped that it would be construed and applied to the end that criminal cases are tried with due diligence consonant with the rights of defendant and the prosecution to a speedy, fair and impartial trial.

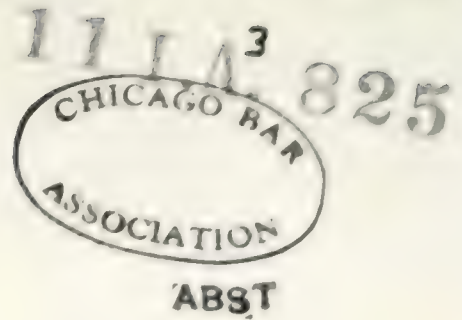
In the case at bar there was no abuse of discretion. Defendant's attorney filed his initial appearance on behalf of defendant on October 22, 1970. Trial of the cause did not commence until April 26, 1971, more than six weeks after a firm trial date was set. The sole reason given for the continuance request was that defendant counsel had been unable to confer with "possible witnesses." No particular potential witnesses were named and no reasons given for counsel's inability to confer with them. Under these circumstances the trial court did not abuse its discretion by denying defendant's request for a continuance.

The judgment of the trial court is therefore affirmed.

JUDGMENT AFFIRMED.

LEIGHTON and HAYES, JJ., concur.

(ABSTRACT ONLY)



57290

LEELAND PEAKE,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
VILLAGE OF ROSEMONT, a Municipal)	
corporation, DAVID COVILL and	)	HONORABLE
J. WILCZYNSKI,	)	PAUL F. ELWARD,
	)	PRESIDING.
Defendants-Appellants.)	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

On November 5, 1970, plaintiff, Leeland Peake, filed his complaint against defendants, the Village of Rosemont, and three Rosemont police officers, David Covill, J. Wilczynski, and R. Franz, for personal injuries sustained as a result of an assault on his person by the police officers on November 13, 1969, and asking for \$50,000 damages. Service was had on defendants, Covill, Wilczynski, and the Village of Rosemont on November 30, 1970, but no service was had on R. Franz. On December 6, 1971, on a status call, the case was dismissed for want of prosecution as to defendant Franz, and an order of default was entered against defendants Covill, Wilczynski and the Village of Rosemont for failure to appear or answer, and the case was set for prove-up of damages on December 21, 1971. Written motions to vacate were denied on December 21 and 27, 1971, and an oral motion to vacate was again denied on February 1, 1972. On February 1, 1972, at the prove-up at which defendants, through counsel, were allowed to participate, the court found for the plaintiff, in the sum of \$8,749 and costs. On appeal, defendants ask that the judgment entered on February 2, 1972, be reversed on the following grounds: (1) the default order of December 6, 1971, should have been set aside by the trial court and not to do so was an abuse of discretion; (2) since no causal connection was shown between defendants' conduct and plaintiff's injuries, the trial court improperly assessed damages. Since we



decide that the default judgment should have been vacated in the trial court, we do not reach the second issue.

Defendants' amended motion to vacate alleged substantially the following points: (1) defendants failed to appear through "inadvertence", in that: the Village, when it was served with notice of claim for personal injury, forwarded the notice to its insurance agent on June 8, 1970; when the police officers were served, they turned over the complaint and summons to the Village clerk, who had "no independent recollection" of what was done with the complaint and summons; (2) on December 16, 1971, notification of the December 6, 1971, entry of the default was received; (3) the defendants had a good and meritorious defense to the action, in that they never assaulted or struck the plaintiff in any way or manner and that any injuries sustained by the plaintiff were as a result of his own intoxication, negligence, and carelessness. The motion was supported by affidavits of the police officers, the Village clerk, and defendants' attorney, to which were attached alleged statements of the plaintiff and his wife, dated January 26, 1970.

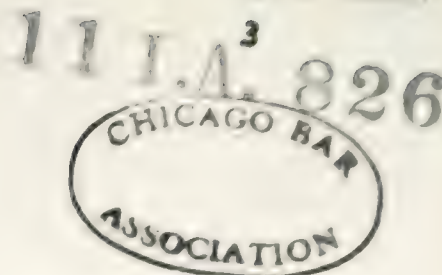
In its most recent expression on the subject, the Supreme Court stated unequivocally that the trial court has authority to set aside a default judgment pursuant to section 50(5) of the Civil Practice Act (Ill.Rev.Stat. 1969, ch. 110, par. 50(5)), stating (People ex rel Reid v. Adkins (1971), 48 Ill.2d 402, 406, 270 N.E. 2d 841):

Under this section, it is no longer necessary that such relief be sought on the precise grounds that there is a meritorious defense and a reasonable excuse for not having timely asserted such defense. The overriding consideration now is whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits. Trojan v. Marquette National Bank, 88 Ill.App.2d 428, 437, 438; Mieszkowski v. Norville, 61 Ill.App.2d 289, 294, 295; Widicus v. Southwestern Electric Cooperative, Inc., 26 Ill.App. 2d 102, 108-111.

In the case at bar, the amended petition to vacate the default judgment, and the accompanying affidavits, clearly made out a meritorious defense. The trial judge, in ruling on the motion, made it clear that he thought it was inexcusable that a municipality, itself served, and two police officers of the municipality, did not appear or answer in any way. However, in addition to these circumstances, the court must, under People ex rel Reid v. Adkins, (1971), 48 Ill.2d 402, 270 N.E.2d 841, also consider whether the relief sought will cause the plaintiff undue hardship, and a relevant factor is whether, as was true here, this was "the first setting of the case". Libert v. Turzynski (1970), 129 Ill.App.2d 146, 262 N.E.2d 741. In addition, it should be considered that this was a personal injury case, and a case where damages were not liquidated. Furthermore, when actual notice of the default judgment was received, defendants acted promptly to vacate the default judgment. Also, the amount of damages awarded was substantial in this case. It seems clear that the Supreme Court, in the language quoted from People ex rel Reid v. Adkins, supra, has mandated a liberal policy with respect to vacating default judgments under section 50(5) of the Civil Practice Act. Especially is this so where there is no indication that plaintiffs gave any additional notice of any kind, however informal, to the defendants, thus making any belief that the defendants intended to let the case go by default an unreasonable one.

Considering all the circumstances, "substantial justice" would be done to the litigants if this judgment were vacated because it is reasonable, under the circumstances, to compel the plaintiff to go to trial on the merits. The judgment of the Circuit Court of Cook County is reversed, and the case is remanded with directions to vacate the default judgment of December 6, 1971.

JUDGMENT REVERSED AND
REMANDED WITH DIRECTIONS.



NO. 58244

EASTMAN DILLON UNION SECURITIES)
& CO., INC., a corporation,)
)
Plaintiff-Appellant,)
)
vs.)
)
HERBERT SHAYMAN,)
)
Defendant-Appellee.)

ARST
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
PHILIP A. FLEISCHMAN,
PRESIDING.

PER CURIAM (Second Division, First District):

This is an appeal by the plaintiff from an order that vacated a default judgment pursuant to a petition filed by defendant under Section 72 of the Civil Practice Act, Ill. Rev. Stat. 1971, ch. 110, par. 72.

Plaintiff contends that (1) the trial court erred in vacating the default judgment because a Section 72 petition cannot be used as a substitute for an appeal; and that (2) in any event, the trial court acted contrary to law when it granted relief under the Section 72 petition and vacated the default judgment. Defendant contends that the merits and legal sufficiency of the Section 72 petition are not before this court because plaintiff did not respond to the petition; and that the trial court properly vacated the default judgment and granted defendant his day in court in exercise of the court's equitable powers under Section 72 of the Civil Practice Act.

A petition under Section 72 cannot be used to review questions of fact which arise from the pleadings or to correct errors of law. People v. Stevens (1970), 127 Ill. App. 2d 415, 262 N.E. 2d 286. It cannot be used as a substitute for appeal. Mehr v. Dunbar Builders Corp. (1972), 7 Ill. App. 3d 881, 883, 289 N.E. 2d 25; Stewart v. Monroe (1965), 62 Ill. App. 2d 414, 211 N.E. 2d 144. The function of a Section 72 petition is to bring before the trial court matters of fact not appearing in the record, which, if known to the court at the time the judgment was rendered, would have prevented its rendition.



In Re Petition to Annex Certain Territory (1963), 42 Ill. App. 2d 432, 192 N.E. 2d 553. In the case at bar, the Section 72 petition presented matters of fact which appear in the record. The default judgment entered on April 18, 1972 and the order of May 25, 1972, denying the defendant's motion to vacate the judgment, appear of record. Defendant could have appealed the judgment and order. Keithlev v. County of Clark (1917), 206 Ill. App. 500; People v. Stevens (1970), 127 Ill. App. 2d 415, 262 N.E. 2d 286. His failure to do so precluded the filing of a Section 72 petition.

Where no timely appeal is taken from a final order, this court is without jurisdiction to review it or consider the propriety of any subsequent order that vacated it. In Re Estate of Ireland (1971), ___ Ill. App. 3d ___, 267 N.E. 2d 681.

Having reached this conclusion, it is unnecessary for us to discuss plaintiff's other contention. The vacature order is reversed and the cause is remanded with directions to reinstate the judgment entered in plaintiff's favor on April 18, 1972.

Reversed and remanded.

Publish abstract only.

57799

WILLIAM H. LOEHDE,

Plaintiff-Appellee,

vs.

LOYOLA UNIVERSITY, et al.,

Defendants-Appellants.)



111.A³ 827

ABST.

) ASSOCIATION

) APPEAL FROM THE CIRCUIT

) COURT OF COOK COUNTY.

) HONORABLE

) JOSEPH J. BUTLER,

) PRESIDING.

PER CURIAM opinion as modified on the denial of the petition for rehearing.

This is an appeal from an order of the circuit court of Cook County granting plaintiff's petition under Section 72 of the Civil Practice Act to vacate a dismissal for want of prosecution. Ill. Rev.Stat. 1971, ch.110, par.72. On appeal, defendants' only argument is that the trial court improperly granted plaintiff's Section 72 petition.

Plaintiff originally filed suit against defendants seeking a temporary injunction and money damages. The request for a temporary injunction was denied on August 7, 1968. Thereafter, on May 15, 1970, upon plaintiff's motion, the case was transferred from the chancery division to the law division. The case was set for trial on January 24, 1972, and when plaintiff failed to appear, the case was dismissed for want of prosecution. On March 8, 1972, plaintiff filed a motion to vacate the dismissal. The motion was not supported by affidavit and was subsequently denied. On May 17, 1972, plaintiff filed a second motion to vacate the dismissal supported by affidavit of plaintiff's counsel alleging that plaintiff did not appear on the date of trial because the case was inadvertently missed on the trial call; that he received no notification that the case would be on the trial call on January 24, 1972, and that the case had not appeared below the black line prior to January 24, 1972. He further stated that no notification of the dismissal was sent to plaintiff's attorneys. In checking the court file to determine when the case was to come up for trial, plaintiff discovered the court file was misplaced. Counsel checked with Judge Butler's clerk and learned of the dismissal. On May 17, 1972 the trial court granted the motion to vacate. On May 26, 1972, defendants filed their notice of appeal.

On June 9, 1972, defendants filed in the circuit court a notice supported by affidavits and copies of the Chicago Daily Law Bulletin requesting the court to take judicial notice, that notice of trial was published on seven dates prior to the dismissal. On June 19, 1972, plaintiff filed a motion supported by affidavit of plaintiff's attorney and plaintiff's attorney's law clerk alleging that plaintiff did not have prior notice of the scheduled trial date and that during the time that the case was dismissed, plaintiff's law firm was in the process of reorganization following the death of a senior partner and the incorporation of a new associate. The affidavit of plaintiff's counsel's law clerk stated that at the time of the dismissal, he was taking his law school examinations and did not pursue the Chicago Daily Law Bulletin, that during his absence another member of the firm was delegated to this duty, but was not informed that the instant case was a chancery number which would be appearing on the law trial division docket.

Rule 301 of the Supreme Court Rules, Ill.Rev.Stat. 1971, ch.110A, par.301, provides that "The appeal is initiated by filing a notice of appeal. No other step is jurisdictional." The filing of a notice of appeal within due time causes jurisdiction of the reviewing court to attach instant and deprives the trial court of jurisdiction. Brehm v. Piotrowski, 409 Ill. 87, 98 N.E.2d 725. Any pleadings filed after the filing of a notice of appeal are a nullity and cannot be considered on appeal. First Federal Savings & Loan v. American National Bank, 100 Ill.App.2d 460, 241 N.E.2d 615. In the case at bar, defendants filed their notice of appeal on May 26, 1972. This act vested jurisdiction in the appellate court and stripped jurisdiction from the trial court. Defendants' request filed on June 9, 1972, and plaintiff's motion filed on June 19, 1972, therefore cannot be considered on appeal. City of Chicago v. Myers, 37 Ill.2d 470, 227 N.E.2d 760.

Defendants argue that their request to take judicial notice was not directed to the trial court, but was directed to this court. A review of the record contradicts this assertion. The request to take judicial notice was not filed in this court, but was filed in

the trial court and bore the trial court number [67 CH 4904]. The request to take judicial notice was incorporated into the record on appeal with all other pleadings filed in the trial court. If the request to take judicial notice was directed to this court, it would have been filed in the appellate court pursuant to Supreme Court Rule 361 and not in the circuit court clerk's office. Further, the request would have borne the number of the case in this court, not the circuit court number.

Defendants also argue that Ill.Rev.Stat. 1971, ch.51, par.14(b) requires this court to take judicial notice of all matters of which the trial court was required to take judicial notice. This principle still does not aid defendants. Defendants cite Thompson v. Carson Pirie Scott & Co., 106 Ill.App.2d 463, 246 N.E.2d 131, as standing for the proposition that this court must take judicial notice of the contents of the Chicago Daily Law Bulletin. Defendants refer to the Chicago Daily Law Bulletin as an official publication, which it is not. In Thompson, this court held it would take judicial notice that no notice of the trial date was sent to litigants prior to trial and that the clerk of the court causes a list of cases to be called for trial to be published in the Daily Municipal Court Record on the preceding day. The court did not hold that this court would take judicial notice of the contents of the Daily Municipal Court Record, but only of the fact that the clerk of the court causes a list of cases to be called for trial to be published therein. In the case at bar, defendants' request to take judicial notice asked the court to take notice that the case had appeared in the Chicago Daily Law Bulletin on seven specific dates. Our research has indicated no case in this state which holds that an appellate court will take judicial notice of the contents of the Chicago Daily Law Bulletin.

In Thompson, the court specifically noted that the parties did not question the fact that there had been publication of the date of trial in the Daily Municipal Court Record. In the case at bar, plaintiff's petition to vacate the default judgment expressly put in issue the question of whether or not there had been publication



in the Chicago Daily Law Bulletin. Publication there was a matter to be proven and not a matter of which the trial court or this court should take judicial notice.

Since the defendants did not file a response to plaintiff's motion to vacate, prior to filing a notice of appeal, the only question is whether plaintiff's motion to vacate, standing alone and uncontradicted, contains sufficient facts to justify the trial court's action in granting the petition.

A petition under Section 72 to vacate a dismissal of an action is always addressed to the equitable powers of the court and only where there is an abuse of discretion will the reviewing court interfere with that decision. Stackler v. Village of Skokie, 53 Ill.App.2d 417, 203 N.E.2d 183. In Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350, the Supreme Court announced the broad rule applicable to Section 72 petitions:

It is our belief that the motion made, under our present practice, be addressed to the equitable powers of the court, when the exercise of such powers is necessary to prevent injustice.

In the case at bar, plaintiff's motion to vacate alleged that prior to the dismissal, plaintiff had not received notice that the case had been set for trial on January 24, 1972, that the case had not appeared below the black line prior to January 24, 1972, and that plaintiff did not receive notice of the dismissal as required by statute (Ill.Rev.Stat. 1971, ch.110, par.50.1). Since these allegations are not contradicted by the record, they must be taken to be true. Stidham v. Pappas, 78 Ill.App.2d 402, 223 N.E.2d 318. Based upon the record before us we cannot say that the trial court abused its discretion in granting plaintiff's motion to vacate.

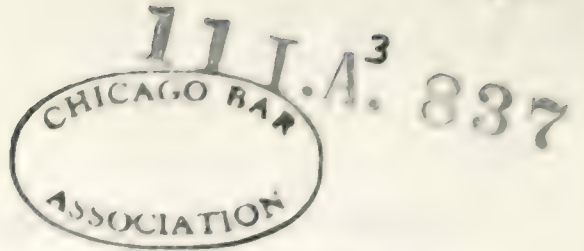
Plaintiff also argues that this court should instruct the trial court to commence a trial only on the issue of damages. Plaintiff argues that the court's finding of fact, made in the chancery division when the temporary injunction was denied, is conclusive as to liability. This issue was not raised in the trial court and is therefore not properly before this court.



For the foregoing reasons, the order of the circuit court of Cook County granting plaintiff's petition for relief under Section 72 of the Civil Practice Act is affirmed.

Order affirmed.

Third Division. Justice Schwartz did not participate.



No. 56908

LEROY PESTKA,

Plaintiff-Appellee,

vs.

SAFEWAY INSURANCE COMPANY,

Defendant-Appellant.

SAFEWAY INSURANCE COMPANY,

Third Party Plaintiff-
Appellant,

vs.

STATE FARM INSURANCE COMPANY,

Third Party Defendant-
Appellee.

ABST

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
JAMES J. MEJDA,
PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

This is an action brought by the plaintiff to compel arbitration pursuant to the provisions of the Illinois Arbitration Act on a claim filed by him against the defendant, Safeway Insurance Company. In turn, Safeway brought a third party action against the third party defendant, State Farm Mutual Automobile Insurance Company, to compel it to provide uninsured motorist protection to the plaintiff under the terms of its policy. After a hearing in October, 1971, the trial court found that the policy of insurance issued by Safeway provided primary coverage to the plaintiff and that the policy of insurance issued by State Farm provided only excess coverage. In this appeal Safeway alleges that its policy of insurance provides only excess protection to the plaintiff and that the State Farm policy provides primary coverage, and, therefore, the finding of the trial court should be reversed.

We affirm.

On November 2, 1968, the plaintiff, Leroy Pestka, a Chicago Police Officer, was the occupant of a Chicago Police Department squad car driven by his partner, Officer Thomas Bolin,



when their vehicle was struck by an uninsured motorist. Officer Pestka suffered certain injuries as a result of this collision.

The City of Chicago did not carry uninsured motorist protection on its police vehicles. However, both Pestka and Bolin had automobile liability policies on their own cars, and both policies included uninsured motorist coverage. Bolin, a State Farm insured, made a claim for his injuries which was paid by State Farm. Pestka, a Safeway insured, made a claim against his insurer for the injuries he suffered in the accident, but Safeway refused to pay or arbitrate the Pestka claim. Pestka sued Safeway to compel arbitration of his claim, and Safeway filed a third party action against State Farm contending that the State Farm policy issued to Bolin provided primary coverage to Pestka. State Farm, in turn, contends that it provides only excess coverage to Pestka.

This is simply a case of contract interpretation, and the relevant portions of the two insurance policies are set out below. Although Safeway has not seen fit to include in the record a copy of its policy issued to the plaintiff, it has reproduced in the pleadings the following portion:

OTHER INSURANCE. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under PART IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance. [Emphasis added.]

The relevant portions of the State Farm policy issued to Thomas Bolin are as follows:

INSURED -- The unqualified word "insured" means ***

(2) any other person while occupying an insured automobile;***

and

9. OTHER INSURANCE. ***

Under coverage U with respect to bodily injury to an insured while occupying a

motor vehicle not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of his coverage exceeds the sum of the applicable limits of liability of all such other insurance.

Insurance policy provisions, as with most contracts, will be given effect if their provisions are clear. (McCann v. Continental Casualty Co. (1956), 8 Ill.2d 476, 134 N.E.2d 302.) The above provisions of the two policies in this case are certainly clear. Both policies are similar in the respect that they both provide uninsured motorist coverage to their policy holders if there is no other primary coverage available to them. In the case of the Safeway insured, Leroy Pestka, there is no other primary coverage available to him "and applicable to such automobile as primary insurance," because the State Farm policy specifically provides that when an insured (Pestka) is injured in an automobile not owned by the named insured, which is the situation here, the uninsured motorist coverage provided by the State Farm policy is only "excess." In other words, it is not primary coverage if there is similar insurance available to such occupant. The State Farm policy does not provide primary coverage to Pestka and is not applicable to the squad car as primary insurance, and we, therefore, find that the excess coverage provision of the Safeway policy is not operative by its own terms. The trial court was correct in its finding that Safeway provided primary coverage for the plaintiff and that State Farm provided only excess coverage.

For the above reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Dempsey, P.J., and McNamara, J., concur.

111A³ 855



58202)
58203) Cons.

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
)	
DAVID MCGATH (Impleaded),	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (First District, Fifth Division):

In two separate complaints, defendant was charged with the offenses of aggravated assault and criminal damage to property. Ill.Rev.Stat. 1971, ch. 38, pars. 12-2(a)(1) and 21-1(a). After a bench trial, defendant was found guilty of both charges and sentenced to concurrent terms of one year each, to be served at the Illinois State Farm.

The public defender, who was appointed to represent defendant on appeal, has now filed a petition to withdraw on the ground that he has been unable to find any legal points arguable on their merits. In support of his motion, he has filed a brief pursuant to Anders v. California, 386 U.S. 738, setting forth as its only point the proposition that the evidence did not establish defendant's guilt beyond a reasonable doubt. Copies of his attorney's motion and brief were served on defendant, and he was given six weeks' notice by this court that he could raise any points he might choose in support of his appeal. Three months have gone by and defendant has not responded.

As relates to this defendant, Edward Novak, Jr., testified that at about 10:30 P.M. on July 11, 1972, defendant broke a window in the witness' house using a sawed-off pool cue, and then kicked in both of the two front doors. While standing only about two feet from Novak, defendant then fired a pistol, the shot narrowly missing Novak in passing over his left shoulder.



[The following text is extremely faint and illegible due to the quality of the scan. It appears to be a multi-paragraph document, possibly a letter or a report, with several lines of text visible across the page.]

The witness had seen defendant four or five times prior to the incident in question.

Josephine Novak, mother of Edward, Jr., testified that she had seen defendant kick open the front door and fire a gun toward the interior of the house; that her son was standing about three feet from defendant when the shot was fired.

Danny Novak, brother of Edward, Jr., testified in corroboration of his brother and mother, except that he thought defendant had aimed the gun at his mother.

Edward Novak, Sr., testified that he was in the kitchen with his daughter, daughter-in-law, and two grandchildren when he heard the window break. He immediately phoned the police.

Officer James Hogan testified that he arrived at the scene in time to arrest one of defendant's co-defendants. He noticed the damage which had been done to the house.

Defendant, his mother, and his sister testified to an alibi. Their testimony contained inconsistencies.

The credibility of the witnesses being a primary function of the trial judge, we have been unable to find anything in our examination of the entire record which would render the state's evidence so unsatisfactory as to raise a reasonable doubt of defendant's guilt.

We conclude, in agreement with defense counsel, that there are no points "arguable on their merits." The appeal is "wholly frivolous."

Defense counsel is given leave to withdraw, and defendant's conviction is affirmed.

A F F I R M E D.

(Publish abstract only.)

11 I.A.³ 873

72-21

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE THOMAS J. MORAN, Acting Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE MEL ABRAHAMSON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 25, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

11-11-11

11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

11-11-11

Abstract

THE JOHN ALLAN COMPANY,
a Corporation,

Plaintiff-Appellant,

v.

LOUIS NEUENDORF,

Defendant-Appellee.

Appeal from the
Circuit Court of
DeKalb County,
Illinois.

ABRAHAMSON and SEIDENFELD, J.J.- Concur.

72-91

UNITED STATES OF AMERICA

11 I.A.³ 874

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE THOMAS J. MORAN, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 25, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

NO. 72-91

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
MAY 23 1973
LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

RICHARD H. GRANT, JR., and)	
WINIFRED G. GRANT,)	
)	
Plaintiffs-Appellants,	)	Appeal from the 16th
	)	Judicial Circuit,
-vs-	)	Kane County.
)	
PAUL OBERSCHNEIDER and VITA	)	Hon. Charles G. Seidel,
OBERSCHNEIDER,	)	Judge presiding.
)	
Defendants-Appellees.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The plaintiff herein filed a complaint in the trial court for specific performance of a contract for the sale of real estate. The defendant in answering, alleged fraud in the inducement of the contract and counter-claimed for the return of \$8,400 earnest money deposit. The trial court entered judgment for the defendants on the complaint and judgment in favor of the counter-plaintiff purchasers on their counter-claim for the return of the earnest money.

The sole issue before this court is whether the finding of the trial court that the plaintiffs as sellers of the real estate were guilty of fraud in the inducement of the contract by making certain representations as to the efficacy of the septic tank and field; and further, whether these misrepresentations were against the manifest weight of the evidence.

The seller, Richard H. Grant Jr., was the builder of the premises in question and upon completion moved into the

residence, and listed the property for sale with a realtor, Craig Abbott. The seller could not recall whether he listed the premises as a five bedroom home but did know it was listed as a three bath home. Examination of the record indicates that the purchasers were advised that the residence did contain five rooms to be used as bedrooms. Dr. Oberschneider testified that during the month of March he and his wife went to the residence and discussed the premises with the seller. He asked if there were anything wrong with the house, whether or not it had city water or septic system, and if the septic was "working fine." Grant replied he had built the house for himself and his family and that he never had any trouble with the septic system. Subsequently, on the 6th of April, 1971, Mrs. Oberschneider went back to the residence with Craig Abbott, the realtor. Again, on that date the seller said that he had never had any trouble with the septic system. Craig Abbott, the realtor, could not recall whether there had been any discussion on the septic system. The offer to purchase was signed on April 8, 1971, by Dr. Paul Oberschneider and Vita Oberschneider, his wife. Subsequent to the signing of the contract of purchase, Dr. Oberschneider determined that the septic system was not working well. He gained this information from a neighbor who had made complaints about the odor. Mrs. Oberschneider contacted George Chicoine, a general contractor in sewer and water, who had installed the septic system on the Grant property, and on April 27, 1971 went with him to the premises and examined the septic field. Chicoine was called as a witness on behalf of the defendants and testified that the septic field was installed in a low spot on the premises; that he examined the field in

April, noticed the ground was wet; that he could smell the septic system; that he put his hand on the surface of the land and it smelled strictly from the septic tank; the soil was soggy and wet; that Grant told him he had had no trouble with the septic system; that "the amount of the land of the septic field was entirely too small and too low," and that a field required for a five bedroom three bath house would have to be larger than a septic system for a three bedroom one and one-half bath home.

The Building and Zoning Officer for Kane County was called and testified that Mr. Grant applied for and a building permit was issued for a house containing three bedrooms and one and one-half baths; that six borings were made on the premises for the septic field area; that the percolation tests should be thirty minutes per inch; when the borings were made the tests varied in the six holes from thirty-three to sixty minutes, and that these borings did not conform with the County Building Code. As a result of the percolation test, Mr. Grant's engineer, Torgny Westerberg, advised the County that he was increasing the size of the field to offset these readings.

The engineer was called by the plaintiffs as a witness and testified that he designed the septic field. Upon cross examination he stated that he designed the system for a three bedroom home; that if it were a five bedroom home it could not be built on this property; and that he did not know that it was a five bedroom home instead of a three bedroom home as shown by the plans. In substance, his testimony was that the area for the septic field was not adequate, was too low, and

the soil conditions were such that the effluent from a five bedroom home could not be accommodated in the area. The plaintiff upon re-direct examination admitted that the original plan submitted to the county called for a three bedroom home, but that during the course of construction five bedrooms were built, of which he was using four. He further testified that he applied for a three bedroom, one and one-half bath home and that during the course of construction he added the extra bedrooms.

At the conclusion of all the testimony and after the trial court had indicated its judgment, the plaintiff submitted a stipulation that the property had been sold for \$72,000 and moved to amend the pleadings to conform to the proof. It is obvious that specific performance could not be enforced as the property had been sold either during the trial or after the judge had rendered his decision. The plaintiff in his motion to amend the pleadings to conform to the proof asked for a judgment for the difference between the sale price to Dr. Oberschneider of \$84,000 and the amount realized from the subsequent sale of \$72,000, or a judgment of \$12,000. The trial court denied this motion, entered judgment, and directed that the attorney for the plaintiffs who was holding the \$8,400 earnest money, pay the same to Dr. Oberschneider and his wife.

We will consider first defendant's contention that the court on refusing to grant specific performance may award damages for breach of contract provided such an award conforms to the proof. It is obvious that after the Judge had rendered his decision directing the return of the earnest money, that he had found the issues to be with the defendants.

It is difficult to see how a trial court would find the issues to be with the defendants and award damages to the plaintiff. We find no error in the trial court's action in refusing to allow the plaintiff to amend his complaint after the decision of the court to seek money damages for the difference between the contract price and the actual selling price.

Appellant next contends a misrepresentation sufficient to constitute fraud is essentially a question of fact and that the burden is on the one alleging fraud to prove it by clear and convincing evidence. As indicated above, considerable evidence was taken from both Dr. Oberschneider and Mrs. Oberschneider to the effect that the seller had represented that he had no difficulty with the septic system, although this was denied by the seller. In addition, the contractor who installed the system testified that Grant, the seller, told him he had had no difficulty with it. As the Supreme Court stated in Brown v. Commercial National Bank of Peoria (1969), 42 Ill.2d 365 at 371, 247 N.E.2d 894, 897:

"* * * It is a well-established rule, too familiar to need citations, that where a case is heard by the chancellor and the evidence is oral, entirely or in part, his decree will not be reversed unless it is against the manifest weight of the evidence, or unless there is clear and palpable error in some other respect. The trial court having heard and observed the witnesses is in a better position than is a court of review to decide what weight should be given their respective testimony."

We adhere to the decision in Brown and refuse to substitute our opinion for that of the trial court as to whether the misrepresentations herein constituted fraud and were against the manifest weight of the evidence. See also Kenny Construction Company of Illinois v. The Metropolitan Sanitary District of Greater

Chicago (1972), 52 Ill.2d 187, 196, 288 N.E.2d 1. We do not deem it necessary to determine under the factual circumstances of this case whether the plaintiff made an election of remedies. The decision of the trial court is affirmed.

AFFIRMED.

J. SEIDENFELD and J. MORAN Concur.

111.A. 886

72-147

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice

HONORABLE GLENN K. SEIDENFELD, Justice

HONORABLE THOMAS J. MORAN, Justice

LOREN J. STROTZ , Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 25, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

NO. 72-147

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,	)	Appeal from the 19th
	)	Judicial Circuit,
-vs-	)	Lake County
)	
CLARENCE AUSTIN,	)	Hon. Harry D. Strouse Jr.
	)	Judge presiding
Appellant.)	

MR. PRESIDING JUSTICE GUILD delivered the opinion of the court:

Clarence Austin, James A. Lee, and Joseph Coleman were jointly indicted for armed robbery on March 4, 1971. James A. Lee upon a plea of guilty was sentenced to 2-6 years. Joseph Coleman upon a plea of guilty was given 5 years probation on April 30, 1971. On August 9, 1971, the defendant Clarence Austin surrendered, was tried by the court without a jury, and the court sentenced him to a term of 6-30 years in the penitentiary.

The defendant Clarence Austin appeals, alleging in substance, four grounds for reversal: (1) He was not proven guilty of armed robbery beyond a reasonable doubt. (2) The trial judge improperly called convicted co-defendant James A. Lee as the court's witness. (3) It was error for the trial judge to have in his possession a transcript of the proceedings as to the entry of a plea of guilty to the armed robbery by the co-defendant, James A. Lee. (4) The sentence imposed was excessive in comparison with that imposed upon the co-defendants.

At 11:55 P. M. on the night of January 9, 1971, two young black males entered the Convenience Food Mart in Waukegan, Illinois. One of the men was wearing a tam or big apple cap,

and was not disguised. The second man was shorter and had pulled a nylon or silk stocking over his face and head. The disguised robber was carrying a sawed-off shotgun.

Alfred O'Connor, a Waukegan attorney, was present in the store and the disguised robber pointed the shotgun at him and ordered him and the others to get on the floor. The two black men took \$111.22 from the cash register and from the counter. O'Connor crawled to the telephone and called the police. Officers from the North Chicago police answered the call. Officer Robert Millimaki on patrol with Officer J. C. Coleman, observed the getaway car, an Oldsmobile bearing the same license number given over the police radio. He attempted to pull the car over but it sped away with Millimaki in pursuit. The robber's car then struck a fence and three men jumped from the car and ran. Officer Millimaki shot Joseph Coleman, the driver of the getaway car, and apprehended him. He was taken to St. Therese Hospital in Waukegan. Police Officer Coleman and Officer Ernest Smith of the Park City police chased another subject from the car, and Officer Coleman apprehended James A. Lee. The third subject in the car identified by Officer Smith as "Pug" Austin, eluded pursuit by the police. Several police officers seeking Austin, went to his home, searched the area and visited various taverns but were unable to find him.

We consider first the allegation of the defendant that he was not proven guilty of armed robbery beyond a reasonable doubt. O'Connor, the Waukegan attorney present at the scene of the crime, described the defendant Clarence Austin as he was able to look at his face through the nylon stocking. He stated that the defendant had a small goatee and a slight mustache, that his nostrils were flared, and that he stood as close as three to four feet from the defendant at the time of the armed robbery. O'Connor prior to becoming an attorney was a military policeman and an officer in the Marine Corps.

He described the defendant's clothing, his height, his weight, and his modified bushy hair cut. Shortly after the crime, O'Connor was shown six or seven photographs of black males and he identified the photograph of Clarence Austin as one of the armed robbers. At the time of trial O'Connor positively identified the defendant, Clarence Austin, as being the disguised armed robber. In addition to O'Connor's testimony, the cashier of the Convenience Food Mart was within six feet of the disguised robber and she positively identified Clarence Austin in court as the assailant with the sawed-off shotgun.

Five days after the armed robbery, Joseph Coleman stated to the police that he committed the crime with James A. Lee and a man named "Pug" or Clarence Austin. James A. Lee, at the time of his plea of guilty, identified the defendant Clarence Austin as being the third party in the armed robbery. The State called James A. Lee as its witness. On the witness stand Lee, when asked who participated with him in the crime, stated it was Joe Coleman and "Pug" Austin. He stated that "Pug" Austin was not in the court room. The State's Attorney then asked the court to call Lee as the Court's witness so that the State could cross-examine him and impeach him by his prior inconsistent statements. Lee was then called as the court's witness and admitted he had testified differently at his hearing before Judge Van Deusen. Lee also testified that he told Judge Van Deusen that Clarence Austin participated in the crime with him. He identified Clarence Austin as "this one right here" and said he did this "to lighten the burden on himself." The attempt of Lee to insert a new name or
Clarence Austin
another defendant in place of the defendant/was obviously complete prevarication.

Clarence Austin
The defendant/called co-defendant Joseph Coleman as his own witness, and Coleman then stated that he had committed the crime with James A. Lee and "Pug" Austin. Coleman said that when he was in the hospital he stated to the police officers that James Lee and "Pug" or Clarence Austin were the the co-defendants with him. Coleman further said the reason he mentioned Clarence Austin as a participant in the crime was that the police officer told him that name. He denied that the defendant Clarence Austin was the third participant in the robbery. Coleman's attempt to insert another Austin is most confusing and the court was more than justified in disbelieving his testimony. It is to be noted that Coleman in conferences with his probation officer, told the probation officer that he had committed the crime with James Lee and Clarence Austin. In rebuttal, police Lieutenant Robert Mc Mahon who had visited Coleman in the hospital, testified that Coleman had told him he had committed the crime with Lee and "Pug." When Coleman was asked who "Pug" was, he stated that "Pug" was Clarence Austin. Examination of the record more than justified the trial court in finding that the testimony of the co-defendants that the defendant herein, Clarence Austin, was not the Austin that they were referring to was contrary to their prior statements and testimony.

The defendant contends that the court disregarded the testimony of Coleman and Lee and only considered the testimony of the other State's witnesses. We believe the court was more than justified in so doing. The defendant, Clarence Austin, was identified by at least two independent witnesses, was

identified by the co-defendants Lee and Coleman after their arrest, and at the time of their respective hearings upon their pleas of guilty. The evidence was more than sufficient to prove the defendant guilty beyond a reasonable doubt. Only after the co-defendants had negotiated a lesser sentence did they change their story in an attempt to exonerate the co-defendant, Clarence "Pug" Austin.

The defendant contends the court should not have called James A. Lee as the court's witness. As indicated above, Lee had previously identified Clarence Austin as "Pug" Austin when he appeared in his own case before Judge Van Deusen. When Lee was called as a witness in the instant case, he testified on direct examination by the State that he committed the armed robbery in the Convenience Food Mart with Joe Coleman and a "Pug" Austin. When the State's Attorney asked Lee on direct examination whether "Pug" Austin was in the court room Lee said that he was not. The State was justified in presuming that Lee's testimony would be the same in Clarence Austin's trial as it was in his own. It was obvious that he was not telling the truth and the court was justified in calling Lee as the court's witness for the purpose of cross-examination by the State's Attorney. (See People v. Williams⁴⁹⁸, (1961), 22 Ill.2d 177 N.E.2d 100, and People V. Jarrett (1965), 57 Ill. App. 2d 169, 206 N.E.2d 835.) Lee was therefore properly called as the court's witness.

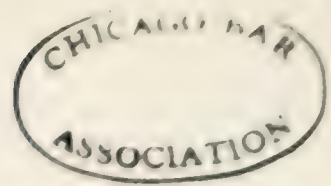
The defendant has raised the contention that it was improper for the trial judge in the instant case to consider the prior plea of guilty to armed robbery by James A. Lee. Defendant cites no authority for this contention and although the judge knew of the convictions of Lee and Coleman, the record does not disclose that the trial judge herein had

examined the transcript of the prior trial of the co-defendant Lee. This contention is without merit.

The last contention of the defendant is that the sentence of 6-30 years for armed robbery was excessive. Defendant merely states that he received a greater sentence because he elected to stand trial. Once again, counsel for the defendant has cited no authority. The defendant, Clarence Austin, was sent to St. Charles School for Boys at the age of 14 years, was released, committed a car theft and was re-committed. In 1966 he was arrested and convicted of armed robbery and aggravated battery and sentenced to 3-8 years in the penitentiary. He was paroled therefrom approximately a year and a half prior to the commission of the instant offense. He subsequently was convicted of possession of fictitious license plates and improper automobile registration. Following that, he was again charged with driving without a driver's license and driving with fictitious license plates and forfeited his bond. More important than this, the defendant was on parole for armed robbery at the time of the commission of the instant offense. The sentence of 6-30 years for armed robbery is not excessive. Judgment of the trial court is affirmed.

AFFIRMED.

MORAN and SEIDENFELD, J.J. - Concur



56086

PEOPLE OF THE STATE OF	)	APPEAL FROM	ABST
ILLINOIS,)		
Plaintiff-Appellee,	)	CIRCUIT COURT,	
)		
vs.	)	COOK COUNTY.	
)		
DONALD WALLACE BAUER,	)	HON. ROBERT J. COLLINS,	
Defendant-Appellant.)	)	Presiding.	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

The defendant, Donald Bauer, was charged by a two count indictment with murder (Ill.Rev.Stat. 1969, ch.38, par.9-1) and armed robbery (Ill.Rev.Stat. 1969, ch.38, par.18-2). After a bench trial defendant was found guilty of the lesser included offense of voluntary manslaughter (Ill.Rev.Stat. 1969, ch.38, par. 9-2) and the offense of armed robbery. He was sentenced to serve concurrent terms of not less than five years nor more than fifteen years in the penitentiary. Defendant appeals.

Robert Poskus testified that defendant resided in his apartment and that he [Poskus] had a conversation with the defendant on the morning of May 31, 1969 at approximately 6:00 A.M. During this conversation the defendant stated that he thought he had "killed somebody" at the Sandburg Village in Chicago. The defendant appeared to be "shaken up" and had blood on his clothing. The defendant stated that "there was blood and that he had felt the man's heart beat to see if it was beating but there was not any (sic) heart beat." The witness also stated that at the time of this conversation the defendant had various items of jewelry and personalty in his possession including two watches, two rings, some rare coins, a tie clasp, cuff links and a bronze medallion.

The witness further testified that he had subsequent conversations with the defendant concerning the death of William Ballard.



He stated that at one of the subsequent conversations the defendant stated that there was "a lot of blood all over" the decedent's bedroom. The witness further testified that defendant never told him the events which led up to his striking the deceased.

Robert Poskus testified further that he did not notify the police "right away" because he did not believe that the defendant had "really killed" William Ballard. The witness stated that he called the police after he heard about William Ballard's death on the "radio or on the television." The witness stated that he had an initial conversation with the police officers at the Seminary Restaurant in Chicago on June 3, 1970 and that the officers then took him to the Damen Avenue Police Station in Chicago where the subsequent investigation was conducted.

Chicago Police Officer Samuel Greiner, called by the People, testified that on May 31, 1970, he was a detective assigned to the Area 6 Homicide-Sex Unit of the Chicago Police Department. He took part in the investigation concerning William Ballard's death. On May 31, 1970, he went to the decedent's apartment at 1460 North Sandburg Terrace, Chicago. After he entered the decedent's apartment, he saw the body of William Ballard on the floor in the bedroom. The decedent was bound with neckties. Decedent's bedroom was in a state of disarray, the dresser drawers had been pulled out and the contents were scattered around the room. There was blood on the floor, bed, bedsheet, pillow, window shade and the walls and ceiling of the bedroom. He found a broken mahogany clock in the room. The inner workings of the clock were on the decedent's bed and the outer piece of the clock was on the floor of the room.

Detective Greiner further testified that on June 3, 1970 he spoke to defendant, Donald Bauer. He advised the defendant of



his constitutional rights and took a written statement from him concerning his involvement in the homicide of William Ballard. This statement was received into evidence as People's Exhibit No. 10.

Defendant, in his own behalf, testified that at approximately 12:00 noon on May 30, 1970, he went to Piper's Pub, a lounge on Division Street, Chicago. He stayed at this Lounge until approximately 3:00 in the morning. During the defendant's stay at Piper's Lounge he was continuously drinking alcoholic beverages.

At approximately 3:00 A.M., he left Piper's and went to the Normandy Lounge on Rush Street, Chicago. Arriving at the Normandy Lounge at approximately 4:00 A.M., he ordered a drink and sat down in a booth. During his stay at the Normandy defendant met the deceased, William Ballard. The deceased asked defendant if he wanted to go up to his apartment for a couple of drinks. Defendant accepted and accompanied the deceased to his apartment. The defendant related that he had one drink in the deceased's apartment, became ill, went to the washroom and vomited. On emerging from the washroom he called out the decedent's name, who replied that he was in the bedroom. Upon entering the bedroom defendant discovered Ballard lying "nude" on the bed. Ballard then allegedly suggested to the defendant that they "make it." (Engage in a homosexual act.) The defendant refused.

The defendant then stated that the deceased got off the bed and tried to kiss the defendant. Defendant then pushed the deceased away. The deceased came back at the defendant, pushing him down against a dresser. Defendant got up and hit the deceased once in the face with his fist. The defendant further testified



that the deceased picked up an object that resembled a nail file. The defendant then grabbed a clock sitting on the dresser and struck the deceased twice on the head. The deceased then collapsed upon the bed. The defendant proceeded to bind the hands and feet of the deceased with a necktie and a belt. Defendant then removed certain items of personal property from the apartment and the body of the deceased and left the apartment.

Defendant argues that the People failed to prove beyond a reasonable doubt that he was not acting reasonably and justifiably in self-defense when he struck and killed the deceased, William Ballard.

Ill.Rev.Stat. 1969, ch. 38 par. 7-1 provides with respect to the "Use of Force in Defense of Person" that a person is justified in the use of force which is intended or likely to cause death or great bodily harm "only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or in the commission of a forcible felony."

Defendant contends that his conduct under the circumstances was not unreasonable, but was justifiable in self-defense and that the voluntary manslaughter conviction should be reversed.

It is clear that much of defendant's testimony was in direct conflict with the other evidence.

At the trial, the defendant testified that the deceased attacked him with a nail file like object. On cross-examination, however, defendant admitted that he did not tell Robert Poskus that the deceased had an object which looked like a "nail file." Defendant also testified that in his statement to the police which was taken on June 3, 1970, a short time after the incident, he failed to mention that the deceased had an object which looked like a "nail file." Defendant explained his failure to inform the police of the



alleged presence of the nail file like object on the basis that after this incident he "forgot a lot of things" and that this was one of the things he forgot. The defendant testified that he did not know at the time of the incident whether he had killed William Ballard. However, shortly after the incident, the defendant fled to his friend Robert Poskus' apartment. At the trial Mr. Poskus testified that defendant told him that he (defendant) thought he had "killed somebody."

The defendant further testified that he struck the deceased while he was standing on one side of the room beside a dresser; however, the decedent's blood was found on the other side of the room saturating the bed and splattered on the walls and ceiling of the room. The defendant further testified he only struck the deceased on the head twice and left him on the bed. When the police discovered the deceased, he was not on the bed but, on the floor of the room. Moreover, the pathological report concerning the deceased which was received by stipulation as People's Exhibit No. 17, stated that Ballard's death was not the result of the blows to his head but "multiple fractured ribs-laceration of lungs." The defendant, however, testified that he did not strike or kick the decedent in the chest.

It is a well established rule that a court of review will not disturb a verdict or finding of guilt unless the evidence is so palpably contrary to the verdict or so unsatisfactory as to justify entertaining a reasonable doubt as to defendant's guilt. People v. McClain, 410 Ill. 280, 102 N.E.2d 134; People v. Jordan, 18 Ill.2d 489, 165 N.E.2d 296; People v. Owens, 73 Ill.App.2d 108, 219 N.E.2d 733; People v. Parker, 120 Ill.App.2d 71, 256 N.E.2d 67.

The determination as to whether the homicide was justified under the law of self-defense is a question of fact. People v.



Watts, 101 Ill.App.2d 36, 241 N.E.2d 46?; People v. Johnson, 108 Ill.App.2d 150, 247 N.E.2d 10; People v. Parker, 120 Ill.App.2d 71, 256 N.E.2d 67.

In People v. Washington, 27 Ill.2d 104, 187 N.E.2d 739, the Supreme Court in considering a case involving a claim that the defendant acted in "self-defense" stated:

"*** It was the province of the trial court, sitting as the trier of fact, to settle conflicts in evidence and to determine from the facts and circumstances whether defendant acted in self-defense, or, if not, whether the circumstances attending the assault were such that the death at defendant's hands constituted murder, manslaughter or justifiable homicide. (People v. Green, 23 Ill.2d 584; People v. Sain, 384 Ill.394.)" (People v. Washington, 27 Ill.2d 104, 187 N.E.2d 739, 740-41)

From our examination of the record, we can perceive no basis for overturning the trial judge's determination that defendant was guilty beyond a reasonable doubt of the offense of voluntary manslaughter.

Defendant argues that the People did not prove that he took the deceased's property by force and therefore, the evidence does not sustain the conviction of armed robbery in violation of Ill. Rev. Stat. 1969, ch. 38, par.18-2(a). He maintains that the taking of the property was accomplished as an "afterthought" and without the use of any force and that these actions do not constitute the offense of armed robbery.

The Illinois Supreme Court in People v. Jordan, 303 Ill.316, 135 N.E. 729, in considering a robbery case involving the contention that the offense was not committed because the taking of the victim's property was an "afterthought" and was accomplished without any violence and without force or intimidation, stated:



"If, as the result of a quarrel, a fight occurs in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes the money of the vanquished one, the offense committed is robbery." (People v. Jordan, 303 Ill.316, 319, 135 N.E.729, 730).

In the present case, the defendant exerted enough force to render the decedent unable to retain possession of his property. Whether the defendant formulated his intent to take decedent's property as an "afterthought" is immaterial.

Defendant urges that he was denied due process of law when the trial judge allegedly based his finding of guilty on matters outside the record. Defendant states that he relied on the theory of "self-defense" and that in this context the nature of the object allegedly brandished by the decedent as one capable of causing death or serious bodily injury was a critical factual issue. Defendant says that in deciding this factual issue, the trial judge strayed from the record, and relied upon his assumption as to the death producing characteristics of a "nail file."

Defendant calls attention to the trial judge's statement:

"That reference to a nail file is, I don't know whether a nail file is any weapon of any sort, and there is no description of the size of it. I don't know what kind of nail file it was. If it was like mine, it is not the type of a weapon that can be frightening to someone."

The judge's statement does not indicate that he relied upon his assumption as to the death producing characteristics of a nail file. Defendant testified that the decedent "grabbed something off the dresser" and that defendant did not "know what it was but it looked like a nail file." The only description of the object given by defendant was that it "looked like a nail file." When viewed in this context the court's statement was a reaction prompted by the lack of completeness present in the defendant's



description of the alleged weapon. From the testimony, the judge would be warranted in concluding that the decedent did not have a "nail file."

We are satisfied that the trial judge did not base his finding of "guilty" on matters outside the record.

The defendant asserts that he was denied a fair trial when the trial court admitted and considered evidence of threats made by third parties to a prosecution witness without any showing that defendant authorized or solicited the threats. Defendant premises this argument on the testimony elicited from the People's witness Robert Poskus who testified that he received threatening letters from defendant's stepmother.

We disagree with defendant's conclusion that the trial court "considered" this evidence. The record reflects that while the trial court gave the prosecution a certain amount of latitude in questioning Robert Poskus, the court advised the prosecutor "to get into some other area" when it became apparent that the testimony lacked the relevance to show "consciousness of guilt" on defendant's part.

As the Illinois Supreme Court in People v. Delno, 35 Ill.2d 159, 220 N.E.2d 190, stated:

"Where guilt is otherwise manifestly shown, there must be raised more than a mere suspicion that the trial judge in a bench trial considered improper evidence in order to rebut the presumption that only proper evidence was considered in reaching a determination on the merits of the cause." People v. Delno, 35 Ill.2d 159, 162, 220 N.E.2d 190, 191-92.

There is at best a "mere suspicion" not sufficient to rebut the presumption that only proper evidence was considered in deciding the case.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.



11 I.A.³ 946
CHICAGO BAR
ASSOCIATION

57638

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
THOMAS TRIBBLE,	)	Hon. Saul A. Epton,
	)	Presiding.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Thomas Tribble, hereafter called defendant, was charged by indictment with armed robbery, in violation of section 18-2 of the Criminal Code. (Ill.Rev.Stat. 1969, ch.38, par.18-2.) The public defender of Cook County was appointed to represent him. After a bench trial, the defendant was found guilty and sentenced to a term of two to five years in the Illinois State Penitentiary.

The defendant wished to appeal and the public defender was appointed to represent him. After examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel pursuant to the requirements set out in Anders v. California, 386 U.S. 738. A brief in support of the petition has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. This court mailed defendant copies of the petition and brief on March 19, 1973. Defendant was informed that he had until May 10, 1973, to file any additional points in support of his appeal. He has not responded.

The petition and brief of the public defender alleged that the only possible issues which could be raised on appeal are

*Mr. Presiding Justice Burke did not participate.



the sufficiency of the indictment and whether the defendant was proven guilty beyond a reasonable doubt.

An indictment is sufficient if it charges the offense in the language of the statute so that the accused is apprised with reasonable certainty of the precise offense with which he is charged. (People v. Hayes, 52 Ill.2d 170, 287 N.E.2d 465.) In the case at bar, the indictment is phrased in terms of the statute and was sufficient to inform the defendant of the charge.

At trial, Robert Hatchett testified that on February 23, 1971, at approximately 8:00 p. m., he was walking on the street in the vicinity of 344 E. 39th Street, Chicago, Illinois. The defendant, whom Mr. Hatchett had previously known from the area, approached him and produced a gun. The defendant took a five dollar bill and a pocket knife from Mr. Hatchett's person. Mr. Hatchett immediately flagged down a passing squad car and informed them of what had occurred. The defendant ran with the police in pursuit.

Officer Kenneth Berris, a Chicago police officer, testified that on February 23, 1971, at approximately 8:00 p. m., Mr. Hatchett flagged down his squad car and informed them that he had just been robbed by the defendant. The defendant ran into an alley with Officer Berris in pursuit. Officer Berris pulled his gun and called to the defendant to halt. The defendant stopped, throwing an object into a trash can. The object was recovered and found to be a loaded .32 caliber pistol. A five dollar bill and a pocket knife belonging to Mr. Hatchett were recovered from the defendant's person.



The defendant testified that on February 23, 1971, he was talking to Mr. Hatchett, whom he had known from the area, on the street at approximately 344 E. 39th Street, Chicago, Illinois. Mr. Hatchett then stopped a squad car and told them that he had just been robbed. The defendant went to the squad car and attempted to explain to the police officers that he did not rob Mr. Hatchett. When he was unable to do so, he ran, but stopped when the police called for him to halt. He denied that he had a gun at any time and also denied that Mr. Hatchett's pocket knife was recovered from his person.

It is the function of the trier of fact to determine the credibility of witnesses and the trial court's finding will not be disturbed unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. (People v. Airdo, 7 Ill.App.3d 1002, 288 N.E.2d 619.) We have reviewed all of the evidence adduced at trial and find it entirely sufficient to establish the defendant's guilt beyond a reasonable doubt. We are satisfied that the defendant was adequately represented by counsel and was afforded full due process of law at all stages of the proceeding.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that none of the points thus raised are arguable on the merits and that an appeal is wholly frivolous. Our examination of the record did not disclose any additional possible grounds for an appeal.

The public defender's motion to withdraw as counsel is allowed and the judgment is affirmed.

Judgment affirmed.





111A³ 947

56605)
56606) CONSOLIDATED
56607)
56608)

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM	
Plaintiff-Appellee,	)		ABST
	)	CIRCUIT COURT,	
v.)		
	)	COOK COUNTY.	
DOROTHY HARRIS, EARL HARRIS,)		
JOHNNIE BURNS and LAURA RAY,	)	HON. PAUL F. GERRITY,	
Defendants-Appellants.)	)	Presiding.	

* PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Each defendant was found guilty, after a bench trial, of the offense of criminal damage to property in violation of Section 21-1(a) of the Criminal Code. (Ill.Rev.Stat. 1971, ch. 38, par. 21-1(a)). Dorothy Harris and Laura Ray were placed on probation for a period of one year. Earl Harris and Johnnie Burns were sentenced to 30 days in the House of Correction. The appeals by defendants have been consolidated for hearing.

John Burrne, a Chicago Police Officer, testified that on July 26, 1971, at approximately 3:00 A.M., he and his partner were on duty in the vicinity of the Associated Retailers Clothing Store located at 941 East 63rd Street, Chicago. As the officers approached the east-west alley in the 6300 block between Ellis and Ingleside, Officer Burrne observed the defendant, Earl Harris, standing at the mouth of the alley in the 6300 block between Ellis and Ingleside, Officer Burrne observed the defendant, Earl Harris, standing at the mouth of the alley on the Ingleside side, approximately three doors from the Associated Retailers Store. Ellis and Ingleside are north and south streets which intersect 63rd Street. Ellis Avenue is east of Ingleside Avenue. The officers went around the block and entered the alley from the Ellis side. As they entered the alley, Officer Burrne observed Johnnie Burns

walking from the rear yard of the Associated Retailers Clothing Store, approximately 15 feet from the rear of the store. He had a large amount of clothing still on hangers flung over his shoulder. As the officers approached Johnnie Burns, he dropped the clothing and ran into the "T" of the alley. As the officers approached the "T" of the alley, they made a left hand turn where they observed a 1966, gold automobile parked in the alley facing north with the trunk open. Dorothy Harris and Laura Ray were seated inside the car and Johnnie Burns was standing outside the car. Officer Burrne's partner ran west and apprehended the defendant, Earl Harris, going up the rear stairs of an apartment building. The officers inquired as to what the people were doing there. Dorothy Harris replied that she was waiting for her husband, who had gone into a building just east of where the car was parked. Johnnie Burns denied any knowledge of the clothing. The officers recovered large amounts of clothing lying in the "T" of the alley which had been dropped by Johnnie Burns. Officer Burrne also investigated the premises of Associated Retailers Store and found that the rear window was open, the burglary bars had been pulled off and the front glass window had been broken to gain entry. The premises were in a state of disarray, with a variety of clothing on the floor.

Michael Lammargo, the district manager for Associated Retailers, Inc., testified that the premises located at 941 E. 63rd Street, Chicago were broken into on July 26, 1971. The front window was broken to gain entry.

Earl Harris testified that on July 26, 1971, he was coming off of 63rd Street and entering the alley in question when he saw the police squad arrive. He started going up the stairs where his brother lived and was arrested. He testified that he originally



had parked his car in the alley, since there is a problem trying to find a parking space on the street, and proceeded in the alley to 63rd Street to see if a liquor store was open.

Dorothy Harris testified that on July 26, 1971, she was parked in the car waiting for her husband who had gone to the liquor store. She observed a man wearing white pants drop some clothing and run by the car. She testified that she told the police what she had observed.

Johnnie Burns testified that on July 26, 1971, he was in the car when Earl Harris parked in the alley and went to the liquor store. He went down the alley to urinate. Upon his return to the car, he was placed under arrest. He testified that he observed a man wearing light colored trousers run down the alley. He denied entering or damaging the property of Associated Retailers, Inc. He stated that he told the police that he saw someone else take the clothes and run down the alley, wearing light colored trousers.

Laura Ray testified that on July 26, 1971, she was in the car with the other defendants. Earl Harris got out of the car to go to the liquor store, while Johnnie Burns got out of the car to urinate. She testified that she observed a man wearing light trousers run through the alley and told the police what she had observed on the day in question.

Officer Burrne testified in rebuttal that at the scene none of the defendants told him that he or she saw a man in light clothing run away. At the station approximately an hour and twenty minutes after the incident, Dorothy Harris stated that she saw another man run down the alley. None of the defendants at any time told the officer that Johnnie Burns had left the car to urinate.

An analysis of the testimony discloses that a reasonable doubt exists as to the guilt of Dorothy Harris, Laura Ray and Earl Harris.



The mere presence at or near the scene of a crime or a negative acquiescence is insufficient to make a defendant accountable for another's conduct. (People v. Barnes, 311 Ill. 559, 142 N.E. 445.) In the case at bar, the only evidence to connect Dorothy Harris and Laura Ray with the crime was that they were parked in an automobile in an alley near the scene of the crime at 3:00 A.M. There is no evidence that they had left the car or in any other way participated in the crime, nor is there evidence from which an inference can be drawn that they knew that a burglary was occurring. The evidence was insufficient to establish their guilt beyond a reasonable doubt.

Johnnie Burns was proven guilty of the crime of criminal damage to property beyond a reasonable doubt. Officer Burrne testified that he initially saw Earl Harris standing at the opening of the alley. He proceeded around the block and from the other end of the alley observed Johnnie Burns walking out of the premises which had been broken into, carrying a large amount of clothing. Johnnie Burns immediately ran, dropping the clothes, and was later apprehended at the car. Earl Harris proceeded from his position at the other end of the alley to the automobile and upon seeing the police officers, attempted to go up the stairs of a nearby apartment building where his brother resided. The car was parked in the "T" alley at 3:00 A.M., with the trunk lid open. Entry had been gained into the clothing store by breaking the front window. Under all of the circumstances there was sufficient evidence to justify the finding that Johnnie Burns was proven guilty beyond a reasonable doubt. We find as a matter of law that there is a reasonable doubt as to the guilt of Earl Harris.

For these reasons, the judgments against Dorothy Harris,



56605-6-7-8

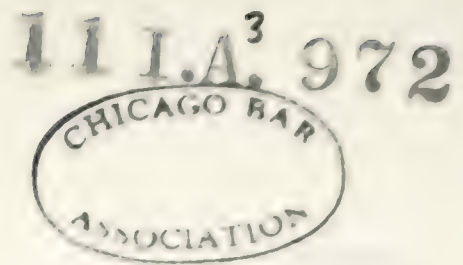
Laura Ray and Earl Harris are reversed and the judgment against
Johnnie Burns is affirmed.

JUDGMENT AGAINST JOHNNIE BURNS AFFIRMED;
JUDGMENTS AGAINST DOROTHY HARRIS, LAURA
RAY and EARL HARRIS REVERSED.

Per Curiam.

* Hallett, J. did not participate.





56630

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM	
	)	CIRCUIT COURT	ABST
Plaintiff-Appellee,	)	OF COOK COUNTY.	
)		
v.)		
)		
WALTER J. COUNCIL,	)	HONORABLE	
	)	KENNETH P. WENDT,	
Defendant-Appellant.)	)	PRESIDING.	

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

This is an appeal by Walter J. Council who was found guilty after a bench trial of the crime of armed robbery in violation of Section 18-2 of the Criminal Code and was sentenced to a term of not less than two years nor more than six years in the penitentiary. Ill. Rev. Stat., 1967, ch. 38, par. 18-2.

The defendant contends that the identification was insufficient to sustain his conviction beyond a reasonable doubt, and that he did not knowingly and understandingly waive his right to trial by a jury.

The record discloses that Lucious Williams was employed as a bartender at the Pioneer Lounge, 236 North Pulaski Road, Chicago, working from 7:00 A.M. until 5:00 P.M. On August 11, 1969, at about 9:00 or 10:00 o'clock in the morning, some men were delivering beer to the tavern. At the time there were two two people in the bar, a male and a female. They did not come in together. Each arrived at about 8:30. The robbery took place at about 9:00 or 9:30.

The defendant was sitting at the table at the front end of the bar. He ordered a beer, finished it and then ordered another. At the time, Williams was servicing the bar alone. The beer drivers were bringing in the beer and Williams was counting it. One of the drivers went into the basement and the other went back outside. Williams turned around and saw the defendant behind the bar with a gun in his hand. The defendant

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

1911

1912

1913

1914

1915

1916

1917

1918

1919

1920

told Williams that he should not move or he would blow his brains out. At that time the defendant was about five or six feet from Williams. The defendant took \$600 from the cash drawer which was located midway of the tavern and then backed out of the tavern through the side entrance. Williams ran to the telephone and called the police. After telephoning the police, Williams ran upstairs to where the owner lived and told him what happened. The police arrived and Williams gave them a description of the defendant.

The next day, August 12, 1969, Officers Ronald Pluta and Nick Trotta came to the lounge and questioned Williams about the robbery. On August 13, 1969, they returned to the lounge and showed Williams a series of photographs. Williams looked at eight or ten photographs and identified the photograph of the defendant as the robber.

The lighting conditions at the time of the robbery were very bright. There were lights in the front part and in the back of the lounge behind the bar.

Williams had occasion to see the defendant again on January 24, 1970. On this day the defendant came into the Pioneer Lounge and was recognized by Williams; Williams told the owner, who was in the lounge at the time, that it looked like the man who held him up. By the time Williams turned around, the defendant had left. The next day, on Sunday, January 25, 1970, the defendant came into the lounge again, this time sitting at the bar. Williams told the owner that he looked like the man who had robbed him. The owner wanted Williams to be certain and told him to look at the defendant, which Williams did. Williams then telephoned the police who came and placed the defendant under arrest.

At the trial Williams identified the defendant, who was in the courtroom, as the robber.

Detective Nick Trotta testified that on August 12, 1969, he investigated the robbery of the Pioneer Lounge, 236 North Pulaski Road, on August 11, 1969. He returned to the lounge on August 13, 1969, with eight to ten photographs which were shown to Williams. All the photographs were of male Negro subjects. Williams identified a photograph of the defendant as the robber. Trotta tried to locate the defendant but was unable to do so. Trotta further testified that on January 25, 1970, Williams called him and said that the defendant was in the tavern; Trotta and Pluta went to the lounge and arrested the defendant who was sitting at the bar.

The defendant testified that on August 11, 1969, the day the robbery took place, he was at home the entire day with his four children and their baby-sitter, Joanne Moore, celebrating the defendant's birthday, and that he was not in the tavern at 236 North Pulaski during the morning of August 11, 1969. The defendant said he had been in the Pioneer Lounge before and after the date of his arrest; and that he knew Williams by sight. The defendant stated that the photograph shown to Williams was one taken by the police in 1960.

Joanne Moore, a witness for the defense, testified that she had known the defendant since 1966 and had been his full time baby-sitter since 1968. Her regular hours were from 7:00 A.M. until 5:00 P.M. She remembered the date of August 11, 1969, as it was a special occasion, being the defendant's birthday. On the day of the robbery she arrived at the defendant's home after 9:00 A.M. The defendant was there and did not leave at any time during the entire day.

Before the trial began there was a discussion between the trial court and the defendant. The court told the defendant he had a constitutional right to a trial by jury. The defendant stated he wanted to waive that right and wanted to be tried by

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the

the eleventh is the fact that the
the twelfth is the fact that the

the thirteenth is the fact that the
the fourteenth is the fact that the

the fifteenth is the fact that the
the sixteenth is the fact that the

the seventeenth is the fact that the
the eighteenth is the fact that the

the nineteenth is the fact that the
the twentieth is the fact that the

the twenty-first is the fact that the
the twenty-second is the fact that the

the twenty-third is the fact that the
the twenty-fourth is the fact that the

the twenty-fifth is the fact that the
the twenty-sixth is the fact that the

the twenty-seventh is the fact that the
the twenty-eighth is the fact that the

the twenty-ninth is the fact that the
the thirtieth is the fact that the

the thirty-first is the fact that the

the thirty-second is the fact that the

the thirty-third is the fact that the
the thirty-fourth is the fact that the

the thirty-fifth is the fact that the
the thirty-sixth is the fact that the

the court. The defendant then signed a jury waiver.

The defendant argues that the burden is on the State not only to prove beyond a reasonable doubt the commission of the crime charged, but that the State is further required to prove that defendant was the person who committed the crime.

Williams, the bartender, was the victim of the robbery and the only person who identified the defendant as the robber. The law is well settled that the uncorroborated identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible although contradicted by the defendant. People v. McVet, 7 Ill. App.3d 380, 385, 287 N.E.2d 479; People v. Day, 2 Ill. App.3d 811, 277 N.E.2d 745.

However, the defendant argues that the discrepancies in the identification by Williams established that the State failed to prove the defendant guilty beyond a reasonable doubt. The defendant states that Williams told the police officers who investigated the robbery that the robber was wearing a gray straw hat, yellow shirt, gray pants and sunglasses and had a very small mustache, and that at the preliminary hearing Williams testified that the robber was not wearing a coat, did not recall what color shirt he wore, or whether he had a goatee, but did remember the robber had a mustache, was wearing sunglasses and wore a brown and gray, black hat with a small brim. At the trial Williams stated that the robber wore a gray straw hat, yellow shirt and gray pants. The defendant relies on the case of People v. Martin, 95 Ill. App.2d 457, 238 N.E.2d 205, where the court reversed the judgment of the trial court because there was a substantial discrepancy between the description of the robbers given by the complaining witnesses at the time of the robbery, under poor lighting conditions, and at the trial.

The first part of the paper discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations. The second part of the paper discusses the methodology used in the study. It mentions the data sources and the data collection methods. The third part of the paper discusses the results of the study. It mentions the findings and the conclusions. The fourth part of the paper discusses the implications of the study. It mentions the practical implications and the theoretical implications. The fifth part of the paper discusses the future research. It mentions the areas for further research and the suggestions for future studies.

On the other hand, precise accuracy in describing wearing apparel and facial characteristics is not necessary where, as here, the identification is positive. See People v. Charleston, 115 Ill. App.2d 190, 253 N.E.2d 91; People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694.

In a bench trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed. People v. Bracey, 129 Ill. App.2d 57, 62, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378. In the case at bar the trial court chose to believe Williams who positively identified the defendant as the robber, and its decision should be affirmed.

The defendant further argues that the court cannot disregard the alibi testimony where the sole and only evidence which contradicts it rests upon the identification of defendant as the perpetrator of the crime. While it is true that such evidence may not be disregarded, there is no obligation on a trial court to believe alibi testimony over positive identification of an accused even though given by a greater number of witnesses. People v. Jackson, ____ Ill.2d ____, ____ N.E.2d ____, (No.44983, opinion April 2, 1973); People v. Robinson, 3 Ill. App.3d 843, 850, 279 N.E.2d 526; People v. Bracey.

In the case at bar Williams had ample opportunity to observe the defendant and to identify him as the robber. On the day of the robbery the defendant was in the lounge for at least 30 minutes prior to the time the robbery was committed. The premises were well lighted and Williams was in close proximity to the defendant. Under such circumstances the trial court could

believe the testimony of Williams over and above the testimony of the defendant that he was at home the entire day of the alleged robbery even though the defendant's alibi was affirmed by Joanne Miller, his baby-sitter, who testified that she was at the home of the defendant with the defendant for the entire day of the robbery.

The trial court was in a better position to observe the demeanor of the witnesses during the trial and to consider Joanne Miller's obvious strong interest in exonerating the defendant. Under such circumstances this court should not disturb the findings of the trial court.

The defendant further argues that the record does not show that he had an adequate understanding of his right to a jury and the consequences of his waiver. Before the trial began the following colloquy took place between the trial court and the defendant in the presence of defendant's counsel:

The Court: * * * One of the rights you have in the State of Illinois is the right to a trial by jury. Are you waiving that right and be tried by me? What is that?

Mr. Council: Yes.

The Court: I am not forcing you into this. You are entitled to a right, constitutional right of a trial by jury. Do you wish to waive that right and be tried by me?

Mr. Council: Yes, sir.

The Court: Yes. You have thought about it? You have talked to your lawyer, is that right? If you do wish to be tried by me, would you kindly sign what we call a jury waiver?

Defendant then signed the jury waiver.

We find no merit in defendant's contention that he did not understandingly waive his right to a trial by jury. People v. Lenair, 130 Ill. App.2d 147, 264 N.E.2d 525.

The judgment is affirmed.

AFFIRMED.

(Publish abstract only.)

No. 57228

PEOPLE OF THE STATE OF ILLINOIS,
 Plaintiff-Appellee,

vs.

OSCAR L. WILLIAMS,
 Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY.

) HONORABLE
) JOHN J. MORAN,
) PRESIDING.

ABST

MR. JUSTICE MCGLOON delivered the opinion of the court:

Defendant, Oscar L. Williams, was found guilty, following a bench trial, of unlawful use of weapons in violation of Ill.Rev. Stat. 1969, ch.38, par.24-1(a)(2), of failure to obtain a state firearm owner's identification card in violation of Ill.Rev.Stat. 1969, ch.38, par.83-2, and of failure to register the firearm with the City of Chicago in violation of Chapter 11, Section 107, of the Municipal Code of the City of Chicago. The court sentenced defendant to 15 days in the County Jail on the first charge, one year's probation on the second charge and a \$100 fine on the third charge. On appeal defendant contends that the evidence introduced at trial was the result of an unlawful search and seizure and the evidence did not establish beyond a reasonable doubt that he intended to use the revolver unlawfully.

We reverse and remand.

On May 7, 1971, Miss Jewel Washington testified that she was at defendant's cousin's house when the defendant's girl friend, Kathy, and her friend, Wendella, started arguing. Miss Washington further testified: "[The defendant] told Wendella to shut up. She wouldn't shut up. He came out and slapped her. She knocked into me, and hit me in the mouth. I said, 'at least you could say you're sorry.'" The defendant did not apologize, and Miss Washington went home to get her brother. When asked what she and her brother were going to do when they got back to the defendant's apartment, she replied, "Fight him."

About five minutes after the slapping incident, a crowd of approximately 25 people, including Miss Washington and her

1871

Received of the
Hon. Secy. of the Navy
the sum of \$1000.00
for the purchase of
the ship "Albatross"
for the service of the
U. S. Navy.

Witness my hand and
the seal of the said
Department at
Washington this
1st day of January
1871.

John A. B. [Signature]
Secy. of the Navy

1871

brother, congregated in front of the defendant's apartment. The defendant testified that the crowd was hostile, and he was afraid that they were going to "beat him up." He further testified that he called the police and then went outside to confront the crowd, that he stood in front of his door with the gun in his pocket, and when the complainant's brother asked, "What you got in your pocket man?", that he took the gun out. The defendant maintains that he merely held the gun in his hand and at no time pointed the gun at anyone. Miss Washington testified that the defendant appeared outside the apartment with his hand in his pocket. Miss Washington further testified that her brother said, "Man what you got in your hand?", and the defendant then took a gun out of his pocket, moved it in a circular fashion, and said, "Anybody move, I will shoot them."

Officer Ralph Helm testified that he answered a police radio call of "a man with a gun on the street at Grenshaw and Keeler." At that location Miss Jewel Washington and two other persons told the officer the defendant had assaulted them with a revolver and directed them to the defendant's apartment. The officer knocked on the door and was admitted. Miss Washington identified the defendant, and the officer then placed him under arrest. He searched the defendant's person and in addition searched the kitchen area of the apartment and recovered a .22 caliber revolver hidden in a bag on a shelf about 10 feet from the defendant. The defendant contends that this evidence was the result of an unlawful search and seizure. We agree.

Officer Helm testified that when he arrested the defendant and informed him of his rights, Williams was standing to one side of the door. The kitchen and living room areas were located in one room. The defendant testified that he was standing in the living room area when searched by the police officer. The officer then conducted a search of the kitchen area and found the weapon in a dog food bag on a shelf approximately 10 feet from where the defendant was standing.



To be constitutionally valid, a warrantless search incident to a lawful arrest must be confined to the arrestee's person and the "area within his immediate control." (Chimel v. California (1969), 395 U.S. 752, 763.) The court in Chimel construed this phrase to mean the area from which the arrestee "might gain possession of a weapon or destructible evidence."

In discussing what types of searches may be constitutionally invalid, the court went on to add:

There is no comparable justification *** for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching *** concealed areas in that room itself. (Chimel v. California (1969), 395 U.S. 752.)

We do not believe that a weapon concealed in a bag on a shelf approximately 10 feet from a person already under arrest can be considered an area "within his immediate control" as defined by Chimel. Thus, an application of fourth amendment principles to the facts of the present case dictates that the weapon should have been suppressed. Furthermore, failure to do so was reversible error. Fahy v. Connecticut (1963), 375 U.S. 85; People v. Catavella (1964), 31 Ill.2d 382, 202 N.E.2d 1.

In Fahy the codefendants were found guilty of having painted swastikas on a synagogue. At the trial of the case, a can of black paint and a paint brush were admitted into evidence over petitioner's objection. On appeal, the Connecticut Supreme Court of Errors held that the evidence had been obtained by means of an illegal search and seizure but affirmed the conviction because it found the admission of the unconstitutionally-obtained evidence to be harmless error. In reversing the Supreme Court said:

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial. (Fahy v. Connecticut (1963), 375 U.S. 85, 86-87.)

In reviewing the evidence the court said:



Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial. It was only after the admission of the paint brush and only after their subsequent use to corroborate other state's evidence *** that the defendants took the stand, admitted their acts, and tried to establish that the nature of those acts was not within the scope of the felony statute under which the defendants had been charged. (Fahy v. Connecticut (1963), 375 U.S. 85, 91.)

In the present case, it was only after the admission of the weapon and only after its subsequent use to corroborate Miss Washington's testimony that the defendant took the stand, admitted his acts and tried to establish that the nature of the act was not within the scope of the statute. The introduction of the unconstitutionally seized evidence contributed to the defendant's conviction. From the foregoing, it appears that the erroneous admission of illegally obtained evidence was prejudicial to the defendant and constitutes reversible error.

As to the defendant's argument that the evidence did not establish beyond a reasonable doubt his intent to use the gun unlawfully, we believe this to be a question of credibility of the witnesses to be determined by the trier of fact.

For the reasons stated, the judgments are reversed, and the cause is remanded for further proceedings not inconsistent with the holdings of this opinion.

Judgments reversed;
cause remanded.

McNamara and Schwartz, JJ., concur.



56979



11 I.A.³ 1045

JOSEPHINE ODOM BOYD,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
	)	ABST
JIMMIE SMITH and PEGGY SMITH,	)	HONORABLE CHARLES P. HORAN,
	)	Presiding.
Defendants-Appellants.)	

PER CURIAM * (First Division, First District):

This is an appeal from an order of the circuit court of Cook County denying the defendants' Section 72(3) petition, filed on November 24, 1971, to vacate the default judgment of \$5,000 entered on January 3, 1968, in favor of the plaintiff. Ill.Rev.Stat. 1971, ch. 110, par. 72(3).

Section 72(3) provides as follows:

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

The defendants filed the Section 72(3) petition on November 24, 1971, and alleged, among other things, that as a result of the fraudulent conduct on the part of the plaintiff, the defendants did not learn of the entry of the default judgment until more than 2 years after it was entered and were prevented from presenting the proper motion to vacate the judgment within the statutory time limit.

The record discloses that the defendants were personally served with summons and that they consulted with an attorney, Emmett Parsons. Thereafter they communicated with the plaintiff, and on April 30, 1966, she signed a notarized statement that she did not want to proceed with the lawsuit. The defendants testified that the plaintiff signed the statement when she was informed

* GOLDBERG, J. took no part.



that defendants did not have any liability insurance. The plaintiff testified that in December, 1965, she was 21 years of age, was unemployed, had three children and no source of income other than funds she received from the Cook County Aid for Dependent Children; that at the time she signed the statement she did not intend to drop the lawsuit; and that she signed it because Jimmie Smith threatened to evict her if she did not do so. The plaintiff further stated that she signed another document, which stated she wanted to vacate the \$5,000 judgment against the Smiths, on May 24, 1971, because she was nervous and the Smiths would not leave her alone; that she thought her signature was not effective because it was not notarized; and that if she signed that statement, the Smiths would go and leave her alone.

At the close of the hearing on the Section 72(3) petition, the trial court stated that it was the defendants who applied duress to the plaintiff and that the plaintiff did not commit any fraud on the defendants. The trial court also stated that the defendants pressured the plaintiff into giving up her legal rights.

In Antczak v. Antczak (1965), 61 Ill.App.2d 404, 411, 209 N.E.2d 838, the court, in discussing when a decree should be vacated after the expiration of thirty days on the basis of fraud, said:

A court of equity will vacate a decree after the expiration of thirty days where fraud has intervened in its rendition, but the fraud, to be a basis for relief, must be of that character which prevents the court from acquiring jurisdiction or which merely gives the court colorable jurisdiction. A court of equity will not, when its decree is questioned upon collateral attack, vacate the same for such fraud as charged here occurring in the proceedings after jurisdiction had been obtained. Barnard v. Michael, 392 Ill. 130, 63 N.E. 2d 858.

In this case, the trial court had already acquired jurisdiction of the subject matter and the parties when, on April 30, 1966, the

plaintiff signed the statement that she did not want to proceed with the lawsuit. Therefore, the plaintiff did not take any fraudulent steps to prevent the trial court from acquiring jurisdiction.

In Mathews v. Atlas Liquors, Inc. (1971), 132 Ill.App.2d 608, 270 N.E.2d 453, the defendants filed a petition under Section 72(3), more than three years after a default judgment had been entered, contending that the plaintiff had fraudulently concealed the existence of the default judgment from the defendant and, because the defendant had a meritorious defense, the default judgment should be vacated. The court held that such concealment must consist of affirmative acts or representation; that there must be some trick or contrivance intended to exclude suspicion and prevent inquiry; and that, under the facts there presented, the plaintiff did not fraudulently conceal the default judgment from the defendants.

In this case, the plaintiff did not fraudulently conceal the default judgment from the defendants. She did not use trickery or contrivance intended to exclude suspicion and to prevent inquiry. It was the defendants who, after being served with summons and after consulting an attorney, took no further action to protect their legal rights in court but, rather, sought out the plaintiff and persuaded her to sign a document to dismiss the cause of action. Then the defendants did nothing further, even though the record shows that they were served with a notice by the attorney for the plaintiff on September 12, 1967, stating that on September 18, 1967, he would present a motion to the court to vacate an order dismissing the above entitled cause for want of prosecution and to set the matter down for prove up on a date certain, inasmuch as the defendants were in default. This notice was served approximately 15 months after plaintiff signed the statement of April 30, 1966, that she did not want to proceed with the lawsuit.



The record further shows that it was not until after defendants were informed that there was a default judgment against them that they again sought out the plaintiff and induced her to sign the statement of May 24, 1971, that she wanted the default judgment vacated.

At the close of the hearing on the Section 72(3) petition, the trial court stated that the plaintiff did not take any fraudulent action against the defendants, but rather, the defendants, by use of duress, "pressured this woman into giving up her legal rights".

Defendants rely on the cases of Kimbrough v. Sullivan (1971), 131 Ill.App.2d 313, 266 N.E.2d 717 and Elfman v. Evanston Bus Co. (1963), 27 Ill.2d 609, 190 N.E.2d 348. However, the Kimbrough and Elfman cases are distinguishable from the facts in the case at bar because in those cases the Section 72 petitions were filed within the two year period. In this case the defendants, who are proceeding under Section 72(3) of the Civil Practice Act, waited more than three years to present their petition and, therefore, must affirmatively prove that the plaintiff took certain acts and made certain representations which tended to fraudulently conceal the default judgment. This they failed to do. To the contrary, the trial court found that it was the defendants and not the plaintiff who took the affirmative acts and attempted to compel the plaintiff into giving up her legal rights.

The defendants state that "As a prerequisite to vacating a default judgment through proceedings under Section 72 of the Civil Practice Act, a defendant must show that he has a meritorious defense." They contend that they were prevented from giving testimony of their meritorious defense. However, under the law, a Section 72 petition must affirmatively set forth sufficient facts to show first, a meritorious defense, and second, due diligence on the part of the defaulted party. Burkitt v. Downey



(1968), 102 Ill.App.2d 373, 377, 242 N.E.2d 901. In the case at bar, the Section 72(3) petition did not set forth any facts showing a meritorious defense. In the absence of allegations of a meritorious defense in the petition, the trial court did not err in rejecting any evidence to that effect.

Under the facts in the record, the trial court did not abuse its discretion when it denied the defendants' Section 72(3) petition and refused to vacate the default judgment. Esczuk v. Chicago Transit Authority (1968), 39 Ill.2d 464, 236 N.E.2d 719.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

* Soedberg, J., Took no part.

71-390

UNITED STATES OF AMERICA

11 I.A. 1066

AB3T

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE THOMAS J. MORAN, Acting Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE MEL ABRAHAMSON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
May 25, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DUNHAM-BUSH, INC., a corporation)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	Kane County,
	)	Illinois.
F. J. BERO & CO., INC., a corporation,)	
)	
Defendant-Appellant.)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

This is an appeal from an order entered in a bench trial wherein the court, at the close of the case in chief, directed a verdict against defendant's counterclaim.

Plaintiff sued defendant for merchandise supplied for a school site. Defendant admitted a portion of the claim but counterclaimed, alleging as a set-off, that plaintiff was liable for certain labor defendant had expended on a hospital site. The cause went to trial solely on the counterclaim.

Defendant, a plumbing, heating and air conditioning concern, was a sub-contractor in the erection of a laundry building at the hospital site. Plaintiff supplied sixteen "non-freeze" heating coils which defendant installed on the north and south sides of the building. During the winter after installation, because the coils had an incorrect



pitch, steam became trapped inside the casings, froze and burst certain of the coils.

Without cost, plaintiff replaced all the coils with units that had built-in pitch and reimbursed defendant for its labor in installing the replacements on the north side of the building. Defendant was not reimbursed for the reinstallation of coils on the building's south side and it is this amount, based upon an alleged contract for labor costs, for which defendant counterclaims.

The greatest portion of the testimony dealt with the determination of who was at fault for the malperformance of the original coils. Fault was immaterial to the issue before the court. The counterclaim was based upon an oral contract for payment of the reinstallation costs which had nothing to do with liability for the original malfunction.

Prior to being directed out, defendant's unrefuted evidence was that plaintiff, through its sales manager, orally agreed to assume the cost of defendant's labor expended in the reinstallation of all coils. The fact that plaintiff paid defendant for a portion of the work, lends support to defendant's position.

Plaintiff's contention that defendant failed to establish any authority in the sales manager to bind plaintiff is, at this point, unsupported by the evidence.

We hold that the defendant established sufficient evidence to withstand a directed verdict. The order of the trial court is therefor reversed and the cause is remanded for further proceedings.

REVERSED and REMANDED

ABRAHAMSON and SEIDENFELD, J.J. - Concur



RESERVE BOOK

ILL. APP. CT. UNPUB'D OPINION

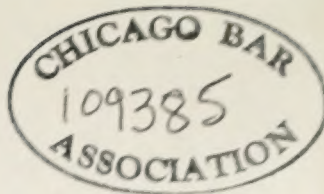
Vol. 11, 3rd Series

109385

Copy 1

This reserve book is NOT transferable and must NOT be taken from the library ~~except when charged out for overnight use~~
You are responsible for the return of this book.

DATE	NAME	
6-24-78	A. H. J.	372-2000
7/7	M. L. J.	476 1345
6-12	R. J. J.	372 2000
8/7/78	Donny Bunt	876 7964
	Chapman & Cutler	726 6130
10/9	Don Bunt	876 7964
12/10	CONVIST	726 6311
2/4/90	Lo. Beyle	222 0800
11/28/80	R. L. J.	329-5477
	Walker	346-8500
7/7/81	M. Deane	726 8565
6/15/83	D. Zalkman	787 7202
4-30-85	Benny Swin	832 406
10-10-85	John J. J.	994-6400
10/17/85	John J. J.	351-8234



This Book
Does Not
CIRCULATE

Copy 1

ILL. APP. CT. - UNPUB'D OPINIONS
Vol. 11, 3rd Series
109385

Copy 1

